

(27,330)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 575.

ANCHOR OIL COMPANY, APPELLANT,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1918, of said Court, before the Honorable Walter H. Sanborn and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the seventh day of June, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein the Anchor Oil Company, a corporation, was Appellant, and W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a corporation, were Appellees, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and Proceedings before the Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

Equity. No. 2385.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS
and THE GULF PIPE LINE COMPANY, a Corporation, Defendants.

ANCHOR OIL COMPANY, Appellant,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS
and THE GULF PIPE LINE COMPANY, a Corporation, Appellees.

Be it remembered, that this cause was begun in the Superior Court in and for Tulsa County, State of Oklahoma, and came to this Court on Petition, Order and Bond for Removal. On the 21st day

of February, A. D. 1917, the same was entered on the dockets of this court and given No. 2385, equity.

The transcript from the Superior Court in and for Tulsa County, State of Oklahoma, is in words and figures as follows:

2 In the Superior Court within and for the County of Tulsa,
State of Oklahoma.

No. 4241.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

v.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS
and THE GULF PIPE LINE COMPANY, a Corporation, Defendants.

Transcript.

Be it remembered, that heretofore, to-wit, on the 18th day of January, 1917, the plaintiff herein, Anchor Oil Company, a Corporation, commenced its action against the above named defendants, W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings, and The Gulf Pipe Line Company, a Corporation, by filing in the Superior Court within and for the County of Tulsa, State of Oklahoma its Petition.

Which said Petition, together with all endorsements thereon, is in the words and figures following, to-wit:

STATE OF OKLAHOMA,

County of Tulsa, ss:

In the Superior Court.

Civil. No. 4241.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDING
and THE GULF PIPE LINE COMPANY, a Corporation, Defendants.

Petition.

First Paragraph.

Comes now the plaintiff, Anchor Line Oil Company, a corporation and for the first cause of action against the above named defendants alleges and states:

That it is a corporation duly organized under the laws of the State of Oklahoma, with full power to contract, and be contracted with, sue and be sued, and was such corporation at all the times hereinafter mentioned, with its principal office and place of business at Tulsa, Tulsa County, Oklahoma; that plaintiff is informed and believes, and so charges the fact to be, that the defendants, W. H. Gray, F. D. McDonnell and F. C. Giddings, are citizens and residents of Tulsa County, Oklahoma; and that Charles Egan is a citizen and resident of Creek County, Oklahoma; and that the Gulf Pipe Line Company of Oklahoma is a corporation duly organized under the laws of the State of Oklahoma, with full power and authority to conduct business in the State of Oklahoma, and with full power to contract and be contracted with, sue and be sued, and at the times herein mentioned said defendant corporation was engaged and is now engaged in the transaction of business in Tulsa County, State of Oklahoma.

3 The plaintiff, Anchor Oil Company, says that it is now the owner of the right to enter, prospect and develop and take and transport oil and gas from and under the following described land, to wit:

1. The North Sixty (6) Acres of the East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty Six (36), Township Eighteen (18) North, Range Twelve (12) East, land situated in Tulsa County, Okla.; and otherwise described as the Northeast Quarter (N. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty Six (36), Township Eighteen (18) North, Range Twelve (12) East, in Tulsa County, Oklahoma, and the North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty Six (36), Township Eighteen (18) North, Range Twelve (12) East in Tulsa County, Oklahoma.

2. The South Half (S. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty Six (36), Township Eighteen (18) North, Range Twelve (12) East, land situated in Tulsa County, Oklahoma.

And plaintiff says that it is now the owner of a certain oil and gas lease on the above described premises and of the oil and gas mining leasehold estate in and to the above described land, and acquired its said title and ownership thereto as follows, to wit:

Plaintiff, Anchor Oil Company, says that one, Jennie Samuels, was a full-blood citizen of the Creek Tribe or Nation of Indians, duly enrolled as such opposite Roll No. 5941; that the above described lands, together with other lands, were duly allotted to her by the Commission to the Five Civilized Tribes on the 28th day of August, 1903, and that the Creek Nation duly conveyed the same to her by a Surplus Allotment Deed dated August 28, 1903, a copy of which deed is filed herewith as a part hereof and marked "Exhibit A," and by homestead deed dated August 28, 1903, a copy of which deed is filed herewith as a part hereof and marked "Exhibit B"; and plaintiff says that said allotment deeds were issued to Jennie Samuels

during her lifetime and were and are filed for record October 6, 1903, in the office of the Commissioner to the Five Civilized Tribes (Dawes Commission) at Muskogee, Oklahoma, and recorded in Book 17, page 80, and Book Q, page 80, respectively.

Plaintiff says that said Jennie Samuels died intestate on the 11th day of October, 1915, and that at that time her permanent residence was, and for a long time prior thereto had been, in Creek County,

Oklahoma; that she left surviving her as her only heirs at law, 4 Feney Rogers, nee Sarkachee, her daughter, who was at the times herein mentioned of full and legal age, being over Eighteen (18) years of age, and also a full-blood Creek Indian, duly enrolled as such opposite Roll No. 5939; and one other heir, Lina White, formerly Lina Lowe, nee Billie, who is likewise a full-blood Creek Indian, and, at the times hereinafter mentioned, was a duly adjudged incompetent, and that Sam W. Brown was her duly appointed, qualified and acting guardian; that said Lina White was a granddaughter of said Jennie Samuels, deceased; and that upon the death of said Jennie Samuels aforesaid, said lands thereupon descended to her said heirs as above named, free and clear of all restrictions against alienation, by virtue of the terms and provisions of the Act of Congress of May 27, 1908.

The plaintiff, Anchor Oil Company, says that on the 6th day of December, 1915, the said Feney Rogers and her husband, Robert Rogers, made, executed and delivered, for a valuable consideration, to J. P. Williams a certain oil and gas lease, by the terms of which they granted, demised, leased and let unto said J. P. Williams, his successors, heirs and assigns, for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon, to produce and take care of said products, all that certain tract of land situated in the County of Creek and County of Tulsa in the State of Oklahoma, as follow, to wit:

The Southwest Quarter (S. W. 4) of the Southwest Quarter (S. W. 4) of Section Eight (8), Township Eighteen (18) North, Range Twelve (12) East, in Creek County, Oklahoma, and the East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-Six (36), Township Eighteen (18) North, Range Twelve (12) East, in Tulsa County, Oklahoma, containing in all One Hundred Twenty (120) Acres, more or less;

on the following terms and conditions, to wit:

(a) That said lease should remain in force for a term of one (1) year from date thereof and as long as oil or gas, or either of them, is produced on said premises.

(b) By the terms of said lease J. P. Williams, his heirs and assigns, agreed to deliver to Robert Rogers and Feney Rogers, their heirs or assigns, free of cost in the pipe line to which wells may be connected, the equal one-eighth ($\frac{1}{8}$) part of all oil produced and saved from the premises.

5 (c) To pay to said Robert Rogers and Feney Rogers, One Hundred Fifty Dollars (\$150.00) each year in advance for

the gas from each well, where gas only is found while the same is being used off the premises.

(d) To pay the said Robert Rogers and Fency Rogers for gas produced from any oil well at the rate of * * * Dollars per year for the time during which said gas shall be so used, said payment to be made each three months in advance.

(e) Said J. P. Williams, his heirs and assigns, by the terms of said lease agreed to commence a well on said premises within six (6) months of the date of said lease, to wit, from and after the 6th day of December, 1915, or pay in advance Ten Dollars (\$10.00) per month for each additional month said commencement or completion of well is delayed from the time above mentioned for the commencement or completion of such a well until a well was or is commenced or completed; and it was agreed that the completion of such a well should be and operate as a full liquidation of all rent under this provision during the remainder of the term of said lease.

(f) Said J. P. Williams, his heirs and assigns of said lease, had the right to use free of cost gas and water produced on said land for operations thereon, and said Williams agreed to pay for damage caused to growing crops on said land.

(g) By the terms of said lease it was agreed and understood between the parties that said J. P. Williams, his heirs and assigns, should not be bound by any change in ownership of the land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance or by receipt of the original instrument of conveyance or a dully certified copy thereof.

(h) By the terms of said lease it was agreed between said parties that all payment which may fall due under said lease may be made directly to Robert Rogers and Fency Rogers or deposited to their credit in the Sapulpa State Bank at Sapulpa, Oklahoma; and it was agreed between said parties by the terms of said lease, that the covenants and agreements therein set forth should extend to their successors, heirs, executors, administrators and assigns; a copy of which lease is filed herewith as a part hereof and marked "Exhibit C".

The plaintiff, Anchor Oil Company, says in the matter of the estate of Jennie Samuels, deceased, pending in the County Court of Creek County, Oklahoma, which court had jurisdiction at the
6 times herein mentioned of said estate and jurisdiction of the matters hereinafter stated, the said County Court and judge thereof did on the 6th day of December, 1915, by an order duly and regularly entered in said matter, approve the said lease from the said Robert Rogers and Fency Rogers to said J. P. Williams, in so far as said lease covered the

North Sixty (60) Acres of the East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-Six (36), Township Eighteen

(18) North, Range Twelve (12) East, land situate in Tulsa County, Oklahoma,

and a copy of said Order and Approval is filed herewith as a part hereof, marked "Exhibit D."

Plaintiff, Anchor Oil Company, says that on the 23rd day of December, 1915, by written assignment, executed, delivered and acknowledged by J. P. Williams, the said J. P. Williams assigned said lease to the Western Rope & Cordage Company, a corporation, its successors and assigns, together with all rights and privileges, terms and condition and obligations in and under said lease, a copy of which assignment is filed herewith as a part hereof and marked "Exhibit E."

Plaintiff, Anchor Oil Company, says that on the 30th day of November, 1915, the said Lina White, formerly Lina Lowe, nee Billie, and her guardian, Sam W. Brown, for good and valuable considerations, made, executed and delivered unto the said Feney Rogers, nee Sarkachee, a certain deed of conveyance, thereby conveying all of the right, title and interest of said Lina White, nee Billie, in and to the following described land, to wit:

The Northeast Quarter (N. E. 4) of the Northwest Quarter (N. W. 4) and the North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East, containing Sixty (60) acres, more or less, situate in Tulsa County, Oklahoma;

that said deed was duly approved on the 14th day of December, 1915, by Vick S. Decker, Judge of the County Court of Creek County, Oklahoma, and approved by said court by an order duly made and entered by said court on the 14th day of December, 1914, a copy of which deed of conveyance is filed herewith as a part hereof and marked "Exhibit F," and a copy of said order is filed herewith as a part hereof and marked "Exhibit G."

7 Plaintiff, Anchor Oil Company, says that on the 27th day of December, 1915, Luia Lowe, nee Billie, now Luia White, an adjudged incompetent, who plaintiff says is the same person as Lina White, formerly Lina Lowe, nee Billie, as hereinbefore set out, by her duly appointed, qualified and acting guardian, Sam W. Brown, for a valuable consideration, made, executed and delivered to said J. P. Williams an oil and gas mining lease on, in and covering the

South Half (S. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East, and containing Twenty (20) Acres, more or less, in Tulsa County, Oklahoma,

which lease was duly approved by the County Court of Creek County, Oklahoma, and the county judge thereof, said court and said judge at the time having jurisdiction of the approval of said lease, and a copy of said lease is filed herewith as a part hereof and marked "Ex-

hibit H," and a copy of the Order of Approval of said lease is filed herewith as a part hereof and marked "Exhibit I;" and plaintiff says that, by the terms of said lease, it was to remain in full force and effect for a term of five (5) years from the third day of January, 1916, and as much longer thereafter as oil or gas is found in paying quantities; and plaintiff says that by the terms and conditions of said lease it was agreed between the said Lina White, formerly Lina Lowe, nee Bille, and the said J. P. Williams, his heirs and assigns, that said Williams would deliver to her credit, or to her heirs and assigns, free of cost in the pipe line to which any wells might be connected, the equal one-eighth ($\frac{1}{8}$) part of all oil produced and saved from the leased premises.

(b) Said J. P. Williams was to pay to Lina White or her heirs and assigns, One Hundred Fifty Dollars (\$150.00) a year in advance for the gas from each well where gas only is found while the same is being used off the premises.

(c) Said Williams was to pay Lina White for gas produced from any oil well and used off the premises at the rate of One Hundred Fifty Dollars (\$150.00) per year for the time during which such gas should be used, said payment to be made each three (3) months in advance.

(d) Said J. P. Williams, his heirs or assigns, by the terms of said lease agreed to complete a well on said premises within twelve (12) months of the date of same or pay at the rate of Twenty Dollars (\$20.00) in advance for each additional twelve (12) months such completion was delayed from the time mentioned for the completion of a well until the well was completed, and it was agreed that the completion of such a well should be and operate as a full liquidation of all rent due under the provisions of said lease.

(e) It was further agreed between the parties that said J. P. Williams, his heirs and assigns, should not be bound by any change in ownership of said land until duly notified of any such change either by notice in writing, duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance or the duly certified copy thereof.

(f) Said J. P. Williams, his heirs and assigns, agreed to pay Lina White all cost of damages to growing crops on said land; and all payments falling due under said lease were to be made directly to the lesser or deposited to her credit in the Bank of Jenks, Jenks, Oklahoma; and by the terms and conditions of said lease all covenants and agreements therein contained extended to their heirs, executors, administrators, successors and assigns in so far as said covenants and agreements were made between the parties to said lease.

Plaintiff, Anchor Oil Company, says that on the 4th day of January, 1916, for a valuable consideration, the said J. P. Williams, by written assignment, made, executed and delivered to the Western Rope & Cordage Company an assignment of the last mentioned lease, together with all rights thereunder and therein, in and to the land

and oil and gas therein and thereunder, described in said lease, a copy of which written assignment is filed herewith as a part hereof and marked "Exhibit J."

Plaintiff, Anchor Oil Company, says that on the 7th day of March, 1916, by written assignment made, executed and delivered to the Anchor Oil Company by the Western Rope & Cordage Company, said Western Rope & Cordage Company assigned and conveyed to the said Anchor Oil Company, a corporation, the above described lease, rights, titles and interests in and to the land hereinbefore described, as covered by said leases, and the rights under said leases, which land is described as follows, to-wit:

The South Half (S. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East, and the Northeast Quarter (N. E. 4) of the Northwest Quarter (N. W. 4) and the

North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of section Thirty-six (36)

Township Eighteen (18) North, Range Twelve (12) East, land situate in Tulsa County, Oklahoma, and otherwise described as the East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East, in Tulsa County, Oklahoma,

a copy of which assignment is filed herewith as a part hereof and marked "Exhibit K."

Plaintiff says that the above and foregoing is a deraignment of its right, title and interest and leasehold estate in and to the

East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East in Tulsa County, Oklahoma.

Plaintiff, Anchor Oil Company, says that by the terms of said leases and the assignments thereof aforesaid, the plaintiff and its assignors, at the times mentioned, became the owners of, and plaintiff is now the owner of the exclusive right to operate or drill on the

East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East in Tulsa County, Oklahoma,

for petroleum, for oil and gas, on the terms and for the time stated aforesaid; and plaintiff, by the terms of said leases, acquired the right to enter, drill, prospect, produce and save from said premises, oil and gas and petroleum, and so had the right to commence a well on said premises for said purposes any time between the 6th day of December, 1915, and the 6th day of June, 1916, and now has the exclusive right of possession of said land for the execution of said leases and assignments thereof, as aforesaid; and plaintiff, Anchor Oil Company, acquired a leasehold estate in the last above described land by which the plaintiff had the sole and exclusive right to enter, within said time, upon, explore

and develop said land for oil and gas and to drill wells for oil and gas and to extract, save and market oil and gas and to run oil and gas that might be found or that should be found under the said land and, dispose of and sell all oil and gas in and under the last described tract of land, excepting the one-eighth ($\frac{1}{8}$) of the oil to be delivered to the grantors in said leases by way of royalty.

Plaintiff says that in May, 1916, and prior thereto, this plaintiff and its assignors, for and on behalf of plaintiff, made and completed preparations to commence a well on said premises
10 in accordance with the terms of said leases, and made and completed preparations to enter upon said premises for the purpose of developing same as aforesaid and for the purpose of drilling oil and gas wells and extracting oil and gas therefrom and selling and marketing the same, and delivering one-eighth ($\frac{1}{8}$) thereof to the grantors in said leases; that the plaintiff was at all times ready, able, anxious and willing to comply with all the terms and conditions of said leases and assignments thereof, and ready, able and willing to enter upon said premises and drill oil and gas wells thereof and develop said property for oil and gas, and save the oil and gas and market the same that might be extracted from said premises; and while said plaintiff was making said preparations to enter said premises to drill said wells and develop said lands according to the terms and conditions of said leases and assignments, and with full knowledge of plaintiff's leases and plaintiff's rights under said leases, and rights in and to said land, and with full knowledge of plaintiff's leasehold estate in said last described premises, the defendants did forcibly, tortiously, wrongfully, unlawfully and without the consent of plaintiff and against the will and over the protest of the plaintiff, the defendants, W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and The Gulf Pipe Line Company of Oklahoma, a corporation, entered into and upon said lands, drilled oil and gas wells thereon, extracted therefrom oil and gas, and wrongfully and unlawfully converted to their own use eighty thousand (80,000) barrels of petroleum, or crude oil, of the value of One Hundred Thousand Dollars (\$100,000.00), over and above the one-eighth ($\frac{1}{8}$) of the oil belonging to the owners of the fee simple title to said land, all of which oil so taken was the property of this plaintiff; and plaintiff says that defendants so entered upon said premises aforesaid and erected derricks and drilled oil and gas wells thereon and extracted oil therefrom, as aforesaid, and so entered upon said premises on the 23rd day of May, 1916, without the consent and over the protest of this plaintiff, and since said date have continued to withhold possession of said property from plaintiff, forcibly, unlawfully and wrongfully, thereby preventing said plaintiff from taking possession of said premises and developing same for oil and gas, and preventing plaintiff from extracting oil and gas from said premises and saving same and selling same and marketing same, to the continuing damage, trespass and injury of said plaintiff and its rights; and the defendants have ever since said time,

to-wit, since May 23, 1916, been in the actual adverse possession of said premises and are now wrongfully and unlawfully excluding the plaintiff from said premises for any and all purposes whatsoever, and are now preventing and excluding the plaintiff from performing the terms and conditions of the leases hereinbefore set out; and defendants will continue to operate said property and extract oil therefrom and gas therefrom and appropriate and convert the same to their own use, and will continue to exclude plaintiff from said premises and from the right to exercise plaintiff's leasehold estate in said premises unless enjoined by order of this court, to the continuing great and irreparable damage and injury of said plaintiff.

Plaintiff says that ever since the 6th day of December, 1915, and the 4th day of January, 1916, this plaintiff has been entitled to the possession of the last described property and of the right to enter upon and into the possession of said property for the purpose of operating for oil and gas and developing same for oil and gas, for the purpose of complying with the terms of the leases as hereinbefore set out; and it is now entitled to such possession for said purposes, but said possession was at said times and is now tortiously, wrongfully and unlawfully withheld from this plaintiff by the defendants to the damage of the plaintiff in the sum of One Hundred Thousand Dollars (\$100,000.00).

Plaintiff, Anchor Oil Company, says that Jennie Samuels had no child or children born to her since March 4, 1906.

Plaintiff, Anchor Oil Company, says that the oil and gas leases from Robert and Fency Rogers and from Lina Lowe White to J. P. Williams, marked "Exhibit C" and "Exhibit H," were and are respectively recorded:

1. In the County Clerk's Office or Register of Deeds' Office of Tulsa County Oklahoma, in Book 180, page 111, December 9, 1915, as to the first mentioned lease; and the order of the County Court of Creek County approving said lease was filed in said office and recorded December 22, 1915, in Book 185, page 452; and on the 4th day of January, 1916, in Book 155, page 254, as to the second lease, "Exhibit H," and a copy of said order approving said lease is included in said lease.

2. The assignment of said first mentioned lease by J. P. Williams to the Western Rope & Cordage Company, a corporation, dated December 23, 1915, was filed for record in the office aforesaid on December 27, 1915, and recorded in Book 185, at page 489.

3. The quit claim deed from Lina White, formerly Lina Lowe, nee Billie, to Fency Rogers, "Exhibit F," was filed in said office on the 17th day of December, 1915, and is recorded in Book 140, page 298.

4. The assignment of the second mentioned lease by J. P. Williams, dated January 4, 1916, assigning same to the Western Rope & Cordage Company, was filed for record in said office on January 4, 1916, and is recorded in Book 185, page 629.

Plaintiff says that the defendants had actual notice and had knowledge in and about the month of March, 1916, of plaintiff's leases, rights, titles and claims, as herein set out, and notwithstanding said knowledge and notice and notwithstanding the facts as herein set out, the defendants, and each of them, wrongfully, unlawfully and tortiously entered upon said premises and commenced operations as hereinbefore set out, and prevented plaintiff from performing its contract and agreements under said leases as to entering, drilling and extracting oil and gas and marketing same, all of which it offered to do before June 6, 1916, and would have done but for the wrongful, tortious and unlawful acts of defendants as herein set out; and plaintiff says that in all other respects it and its assignors complied with all the terms and conditions, of said leases; that at no time was this plaintiff or any of its assignors notified of any transfer, sale or conveyance of said land to any person, as required by the terms and conditions of said leases, but notwithstanding this fact the plaintiff says that it and its assignors, before the 6th day of June, 1916, deposited in the State Bank of Sapulpa, Oklahoma, Ten Dollars (\$10.00) advance rental under the first mentioned lease, to the credit of Fency Rogers and Robert Rogers, having first attempted to find Robert Rogers and Fency Rogers to pay them directly said rental, and having failed to find them, deposited said rental as herein stated; and that thereafter the plaintiff and its assignors were informed that Fency Rogers and Robert Rogers and Lina Lowe White had sold the said land to one, L. B. Jackson; and that plaintiff and its assignors tried to locate said Jackson and pay him directly the said rentals, but failed to find him, and thereafter, on or about the 15th day of June, 1916, offered to deposit Ten Dollars (\$10.00) in said last mentioned bank to the credit of said Jackson and said bank refused to accept said money; and that the plaintiff, on the 7th day of July, 1916, deposited in said bank to the credit of L. B. Jackson, the sum of Twenty Dollars (\$20.00) to pay the advance rentals on said leases according to the terms thereof; and that afterwards, in August, 1916, said L. B. Jackson refused to accept said rentals and refused to recognize any rights or claims of the plaintiff or its assigns.

13

Second Paragraph.

Plaintiff, for a second cause of action against the defendants herein, states and alleges:

It hereby adopts and reaffirms all of the allegations in said first cause of action, as above set out, and makes the same a part and parcel of this, its second cause of action, the same as if fully and completely herein set forth and repeated; that the said defendants claim some right, title, estate and interest in and to the oil and gas mining leasehold estate pertaining to the lands hereinabove described, the exact nature of which, character and extent of which are to this plaintiff unknown, except that said defendants have caused to be filed for record in the office of the County Clerk within and for Tulsa County,

Oklahoma, certain alleged and purported instruments, as follows, to-wit:

1. An alleged and purported oil and gas mining lease executed under date of December 5, 1914, by Jennie Samuels as lessor and to F. D. McDonnell and Charles Egan as lessees, which said alleged and purported oil and gas mining lease was filed for record in the office of the County Clerk in and for Tulsa County, Oklahoma, on the 10th day of August, 1916, and now appears of record therein in Book 167, page 148 thereof.

2. A certain alleged and purported assignment dated August 8, 1916, executed by F. D. McDonnell to F. C. Giddings and filed for record in the office of the County Clerk of Tulsa County, Oklahoma, on the 10th day of August, 1916, and now appearing of record therein in Book 196 at page 434 thereof.

3. A certain alleged and purported assignment dated September 5th, 1916, executed by F. C. Giddings to W. H. Gray, filed for record in the office of the Register of Deeds within and for Tulsa County, Oklahoma, on the 5th day of October, 1916, and now appearing of record therein in Book 202 at page 178 thereof.

Plaintiff states that said pretended and purported oil and gas mining lease and the said pretended and purported assignments thereof are null and void and of no validity or force whatsoever, but that the same, having been filed for record in the office of the County Clerk of Tulsa County, as aforesaid, constitute a cloud upon the title of this plaintiff in and to the property hereinabove mentioned and described, and plaintiff is entitled to have same cancelled and removed of record.

14

Third Paragraph.

The plaintiff, for its third cause of action against the defendants herein, alleges and states:

That it hereby adopts and reaffirms all of the allegations in said first and second causes of action hereinabove specifically set out and makes the same a part and parcel of this, its third cause of action against said defendants, the same as if fully and completely herein set forth and repeated; and this plaintiff further states and alleges that the reasonable rental value of the property hereinabove described, for the time that this plaintiff has been unlawfully and wrongfully deprived of the use, occupation and possession thereof, as hereinabove specifically set forth, is the sum of One Hundred Thousand Dollars (\$100,000.00); and that by reason of having been unlawfully kept out of possession of said property by said defendants, as specifically hereinabove described, the plaintiff has been deprived of the right and opportunity to improve and develop same and to collect and earn the rents and profits therefrom in the sum of said One Hundred Thousand Dollars (\$100,000.00); that said property is an oil and gas producing property and that its special value is by reason of the production of petroleum, oil and gas therefrom; that said property is

situated in an oil field in what is commonly known as proven territory, and that oil wells have been drilled and oil wells are now being operated on property adjoining same, which have not been offset, and that this plaintiff has offered and demanded the right and privilege to go upon said leasehold estate to drill said offset wells and thereby to keep and prevent the oil and gas from being drained from and under the property hereinabove described by the adjoining wells thereto, but that said defendants have refused and now refuse to permit this said plaintiff to drill said offset wells and protect the lines of said property from drainage by surrounding leases as aforesaid.

Plaintiff states that it is informed and believes, and so believing, it is therefore alleged that the defendants, and each of them, except the Gulf Pipe Line Company, are insolvent and unable to respond to this plaintiff for damages and that it is necessary that this Honorable Court appoint some suitable person as Receiver of said property in order to preserve and conserve and protect the corpus of the estate pending the final termination of this action; that the said Gulf Pipe Line Company of Oklahoma is a common carrier engaged in transporting oil from said leased premises and as such will deny any liability to the plaintiff by reason of the facts, circumstances and statements hereinabove contained.

15 Wherefore, The premises considered, the plaintiff prays judgment and decree of this Honorable Court as follows, to-wit:

First. That plaintiff be declared to be the owner of the oil and gas mining leases and the oil and gas mining leasehold estate in and to the lands hereinbefore described, and the oil and gas in and under and upon the same, and all equipment thereon, and as such, be entitled to the exclusive and sole possession of same for the purpose of appropriating, market- and developing said lands and the oil and gas therein and thereunder, in accordance with the terms and stipulations in said leases contained.

Second. That the said defendants, and each of them, and all persons claiming or to claim by, through or under said defendants or any of them, be adjudged and declared to have no right, title, estate or interest in and to the said property or any part thereof, and that the alleged and purported muniments of title and oil and gas lease and assignments thereof, filed for record by said defendants as herein specifically set up and alleged, and each of them, be by this Honorable Court ordered cancelled of record as a cloud on *the* into or upon said property *on* any part thereof.

Third. That the said defendants, and each of them, be adjudged and decreed to have no power, authority or warrant to withhold the right of possession of plaintiff in and to said property, and that said defendants, and each of them, be perpetually enjoined and forbidden from interfering with the possession of the plaintiff in and to said property, and be further enjoined and forbidden from trespassing or entering into or upon said property *on* any part thereof.

Fourth. That the said plaintiff have and recover of and from the said defendants, for the unlawful detention and withholding of said property, the said sum of One Hundred Thousand Dollars (\$100,000) and such other sum or sums as the court may find to be due said plaintiff from said defendants.

Fifth. That pending the final termination of this suit, this court appoint some suitable person as a Receiver for said property, to take possession of same and to conserve, protect and preserve the said property and the proceeds therefrom, pending the final termination of this action.

Sixth. That said plaintiff have and recover from the defendants the costs herein and that said plaintiff have such other and further relief, both special and general, to which in law or equity it may, in the opinion of this Honorable Court, be entitled.

C. P. CHENAULT,
GEO. T. BROWN,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Affiant, B. M. Gessel, says that he is the duly qualified and acting President of the Anchor Oil Company, and he says that the statements of the foregoing petition are true as he verily believes.

B. M. GESSEL.

Subscribed and sworn to before me this 19th day of January, 1917.
[SEAL.] AGNES C. LEFTWICH.

Notary Public.

My commission expires July 24, 1917.

"EXHIBIT A."

Allotment Deed. Creek Indian. Roll No. 5941.

Filed for record October 16, 1903, in the office of the Commissioner to the Five Civilized Tribes (Dawes Commission) at Muskogee, Oklahoma, and recorded in Book 17, page 80.

Muskogee (Creek) Nation,
Indian Territory.

To all to whom these presents shall come, greeting:

Whereas, By the Act of Congress approved March 1st, 1901 (31 Stats. 861), agreement ratified by the Creek Nation, May 25th, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians in the Indian Territory, except as therein provided, should be divided among the citizens of said tribe by the United States Com

missioner to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed; and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Jennie Samuel, a citizen of said tribe, as an allotment exclusive of a forty acre homestead, as aforesaid.

Now, Therefore, I, the undersigned, the principal chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Jennie Samuel, all right, title and interest — the Muskogee (Creek) Nation and all other citizens of said nation in and to the following described land, viz.:

Southwest Quarter of Southwest Quarter of Section 8 and the South Half of the Northwest Quarter of Section 36, Township 18 North, Range 12 East

of the Indian Base Meridian, in Indian Territory containing 120 acres more or less, as the case may be, according to the United States Survey thereof, subject however, to all provisions of said Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 28th day of August, A. D. 1903.

[SEAL.]

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior. Approved Oct. 9, 1903. Thos. Ryan, Acting Secretary, By Oliver A. Phelps, Clerk.

"EXHIBIT B."

Homestead Deed. Creek Indian. Roll No. 5941.

Dated Aug. 28, 1903.

Filed for record Oct. 16, 1903, in the office of the Commissioner to the Five Civilized Tribes at Muskogee, Oklahoma (Dawes Commission) and recorded in book Q, page 80.

Muskogee (Creek) Nation,
Indian Territory.

To all to whom these presents shall come, greeting:

Whereas, By the Act of Congress approved March 1st, 1901 (31 Stats. 861), agreements ratified by the Creek Nation, May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians in the Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Com-

missioner to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that each citizen shall select or have selected for him, from his allotment forty
18 acres of land as homestead for which he shall have a separate deed; and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Jennie Samuel, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the principal chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Jennie Samuel, all right, title and interest of the Muskogee (Creek) Nation and all other citizens of said nation in and to the following described land, viz.:

The Northeast Quarter of the Northwest Quarter of Section 36, Township 18 North, Range 12 East;

east of the Indian Base and Meridian, in Indian Territory containing 40 acres more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress, relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902. (Public No. 200.)

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 28th day of August, A. D. 1903.

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior. Approved Oct. 9, 1903. Thos. Ryan, Secretary, By Oliver A. Phelps, Clerk.

"EXHIBIT C."

Oil and Gas Lease.

Agreement, made and entered into the 6th day of December, 1915 by and between Robert Rogers and Fency Rogers, née Sarkachee of Creek County, Oklahoma, of the first part, lessors, and J. P. Williams, party of the second part, lessee.

Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements herein after contained on the part of the party of the second part to
19 be paid, kept and performed, has granted, demised, leased and let and by these presents do grant, devise, lease and let unto the said second party his successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying

pipe lines, and of building tanks, powers, stations and structures thereon to produce and take care of said products, all that certain tract of land situate in the County of Creek and Tulsa, State of Oklahoma, described as follows, to wit:

S. W. 4 of S. W. 4 of Section 8, Township 18, R. 12 in Creek County, Oklahoma, and

E. one-half of N. W. 4 of Section 36, Township 18, Range 12 in Tulsa County, Oklahoma, and containing in all 120 acres, more or less.

It is agreed that this lease shall remain in force for the term of one years from this date, and as long thereafter as oil or gas or either of them is produced therefrom by the party of the second part, his successors or assigns.

In consideration of the premises the said party of the second part covenants and agrees:

1st. To deliver to the credit of the first part- their heirs or assigns, free of cost, in the pipe line to which may connect in wells the equal one-eighth part of all oil produced and saved from the leased premises.

2nd. To pay to the first party One Hundred & Fifty Dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and the first part- to have gas free of cost from any such well for * * * stoves and * * * inside lights in the principal dwelling house on said land during the same time by making * * * own connections with the well.

3rd. To pay to the first parties for gas produced from any oil well and used off the premises at the rate of — Dollars per year, for the time during which such gas shall be so used, said payments to be made each three months in advance.

The party of the second part agrees to commence a well on said premises within six months from the date hereof or pay in advance \$10.00 Dollars per month in advance for each additional month such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

20 The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said land for operation thereon except water from wells of first party.

When requested by first party, the second party shall bury * * * pipe lines below plow depth.

No well shall be drilled nearer than 50 feet to the house or barn on said premises.

Second party shall pay for damages caused by it, to growing crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

The party of the second part shall not be bound by any change in the ownership of said land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance or a duly certified copy thereof.

All payments which may fall due under this lease may be made directly to Robert Rogers and Fency Rogers or deposited to their credit in Sapulpa State Bank, Sapulpa, Oklahoma.

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators and assigns.

Witness the following signatures and seals.

ROBERT ROGERS [SEAL.]
FENEY. [SEAL.]

Acknowledgment.

STATE OF OKLAHOMA,
County of Tulsa, ss:

On this 6th day of December, A. D. 1915, before me, the undersigned, a notary public in and for the county and state aforesaid, personally appeared Robert Rogers and Fency Rogers, nee Sarkachee, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as — free and voluntary act and deed for the uses and purposes therein set forth.

DAISY C. TUCKER,
Notary Public.

My commission expires Feb. 13, 1919.

“EXHIBIT D.”

75619.

Order Approving Oil and Gas Lease.

21 Filed December 22nd, 1915, at 1:35 P. M. Recorded in
Book 185, page 452, in the office of the Register of Deeds
within and for Tulsa County, State of Oklahoma.

STATE OF OKLAHOMA,
County of Creek, ss:

In the County Court.

In re the ESTATE of JENNIE SAMUELS, Deceased.

This cause coming on to be heard in the petition of Robert Rogers and Fency Rogers, for approval of oil and gas lease, made and executed on the 6th day of December, 1915, by said parties, to J. P. Williams, on the

Southwest Quarter ($\frac{1}{4}$) of the Southwest Quarter ($\frac{1}{4}$) of Section 8 and the East Half ($\frac{1}{2}$) of the Northwest Quarter ($\frac{1}{4}$) of Section 36, Township 18 North, Range 12 East, the former tract of land being in Creek County and the latter tract of land being in Tulsa County, Oklahoma.

The court finds that the above described land was owned by Jennie Samuels, now deceased, the mother of Fency Rogers and further finds by deeds of partition which have been approved by this court between the heirs of Jennie Samuels, deceased, to-wit: Between Lina Lo White, *formally* Billy and Fency Rogers *formally* Narchakee. Said above described land has been divided as follows, to-wit:

The Southwest Quarter ($\frac{1}{4}$) of the Southwest Quarter ($\frac{1}{4}$) of Section 8, Township 18 North, Range 12 East in Creek County and the South 20 acres of the East Half ($\frac{1}{2}$) of the Northwest Quarter ($\frac{1}{4}$) of Section 36, Township 18 North, Range 12 East, in Tulsa County, Oklahoma, has been partitioned and deeded to said Lina Lo White by Fency Rogers and that the north 60 acres of the East Half ($\frac{1}{2}$) of the Northwest Quarter of Section 36, Township 18 North, Range 12 in Tulsa County, Oklahoma, has been partitioned and deeded to Fency Rogers, aforesaid.

And the aforesaid oil and gas lease by said Robert Rogers and Fency Rogers to said J. P. Williams is found to have been executed for a reasonable consideration and that the parties herein mentioned desire that same shall be approved — is a full-blood Creek Indian.

It is therefore ordered, decreed and adjudged, that the aforesaid lease be and the same is hereby approved in so far as it covers the North 60 acres of the East Half ($\frac{1}{2}$) of the Northwest Quarter ($\frac{1}{4}$) of Section 36, Township 18 North, Range 12 East, situated in Tulsa County, Oklahoma.

The court further finds that Fency Rogers is not the owner and has no interest at the present time in the Southwest Quarter ($\frac{1}{4}$) of the Southwest Quarter ($\frac{1}{4}$) of Section 8 and the South 20 acres of the East Half ($\frac{1}{2}$) of the Northwest Quarter ($\frac{1}{4}$) of Section 36, Township 18 North, Range 12 East, the former tract being in Creek County and the latter tract being in Tulsa County and the aforesaid oil and gas lease so far as the last mentioned and described lands are concerned, is disapproved, and it is therefore ordered and directed by the court that said lease as affecting the last described land be and the same is hereby disapproved.

Given under my hand this 14th day of December, 1915.

[SEAL.]

VICK S. DECKER,

Judge.

STATE OF OKLAHOMA,

County of Creek, ss:

In the County Court.

I, W. R. Casteel, Court Clerk in and for Creek County, State of Oklahoma, hereby certify that the within and foregoing is a true

copy of the original Order approving Oil and Gas Lease in cause No. 433 F. B. In the matter of the estate of Jennie Samuels, deceased, as the same appears on file and of record in my office.

W. R. CASTEEL,

Court Clerk,

By RAY McELHINEY,

Deputy.

[County Court Seal.]

Internal Revenue Stamps 10c. cancelled.

"EXHIBIT E."

137—371.

Assignment of Oil and Gas Lease.

Dated December 23, 1915, and filed for record in the office of the Register of Deeds within and for the County of Tulsa, at Tulsa, Oklahoma, on December 27, 1915, at 2:00 P. M. and recorded in Book 185 at page 489.

Whereas on the 6th day of December, 1915, Robert Rogers and Feney Rogers, made, executed, acknowledged and delivered unto J. P. Williams, a certain oil and gas mining lease covering the

Southwest Quarter (SW4) of the Southwest Quarter (SW4) of Section Eight (8) in Township Eighteen (18) of Range Twelve (12); in Creek County, Oklahoma, and also covering the east one-half of the Northwest Quarter (E2 of NW4) of Section Thirty-six (36), in Township Eighteen (18) of Range Twelve (12) in Tulsa County, Oklahoma.

And which lease was approved by the County Court of Creek County, Oklahoma, on December 14th, 1915, in so far as the same covered and covers the northeast quarter (NE4) of the northwest quarter (NW4) and the north one-half (N2) of the southeast quarter

(SE4) of the Northwest quarter (NW4) of section thirty-six (36) in Township Eighteen (18) of range twelve (12) in Tulsa County, Oklahoma.

And which lease was filed of record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, on December 9th, 1915, and a certified copy of the order of the County Court of Creek County, Oklahoma, approving said lease in so far as the same covers the northeast quarter of the northwest quarter and the north one-half of the southeast quarter of the northwest quarter all being in and of section thirty-six (36), township eighteen (18), range twelve (12), lying, situate in Tulsa County, Oklahoma, was filed for record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, on December 22nd, 1915.

Now, therefore, and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, paid unto the said J. P. Williams, said lessee by Western Rope and Cordage Company, a corporation, the said J. P. Williams does hereby bargain, sell, transfer,

vey and assign all his right, title and interest in and to said oil and gas lease in so far as the same covers

the northeast quarter of the northwest quarter (NE4 of NW4) and the north one-half of the southeast quarter of the northwest quarter (N2 of SE4 of NW4) all being in and of section thirty-six in township eighteen, range twelve, lying and situate in Tulsa County, State of Oklahoma.

to the Western Rope and Cordage Company, a corporation, its successors and assigns.

And the said J. P. Williams does covenant with said Western Rope and Cordage Company, its successors and assigns, that he is the lawful owner of the aforesaid oil and gas lease and the rights and interests thereunder in so far as the same covers the northeast quarter of the northwest quarter and the north half of the southeast quarter of the northwest quarter of section thirty-six in township eighteen of range twelve lying and situate in Tulsa County, Oklahoma, and that he will and does hereby warrant the same as against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said J. P. Williams has hereunto set his hand this the 23rd day of December, 1915.

J. P. WILLIAMS.

STATE OF OKLAHOMA,
Tulsa County, ss:

Be it remembered that on this 23rd day of December, 1915, before me, the undersigned notary public in and for said county and state personally appeared J. P. Williams, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my official signature and affixed my notarial seal the day and year first above written.

[SEAL.]

C. R. RICHARDS,

Notary Public.

Commission expires June 27, 1919.

"EXHIBIT F."

No. 75491.

Quit Claim Deed.

Now All Men by These Presents:

That Lina White nee Lowe nee Billie incompetent and Samuel W. Gray her legal guardian parties of the first part, in consideration of the sum of a partition or exchange of interests in lands and one dollar in hand paid, the receipt of which is hereby acknowledged, do

hereby grant, bargain, sell and quit claim unto Fency Rogers nee Sarkache the following described real property and premises, situated in Tulsa County, State of Oklahoma, to-wit:

Northeast quarter of northwest quarter and the north one-half of the southeast quarter of northwest quarter of section 36, township 18 north range 12 east and containing 60 acres, more or less, together with all the improvements, thereon and appurtenances thereto belonging.

To have and to hold said described premises, unto the said party of the second part, her heirs or assigns.

Signed and delivered this 30th day of November, 1915,

LINA WHITE, NEE BILLE,
SAMUEL W. BROWN,

Guardian of Lina White, nee Lowe, nee Bille, Incompetent.

Examined and approved by me this 14th December, 1915. Court Seal, Creek County, Oklahoma.

VICK S. DECKER,
County Judge.

Internal Revenue 50c.

STATE OF OKLAHOMA,
Creek County, ss:

Before me, the undersigned, a notary public, in and for said county and state on this 30th day of November, 1915, personally appeared

25 Lina White nee Lowe nee Billie and Samuel W. Brown, her legal guardian, to me known to be the identical persons, who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and date above written.
[SEAL.] R. L. WILKINSON,

Notary Public.

My commission expires Oct. 23, 1917.

I hereby certify that this instrument was filed for record in my office on 17 day of Dec., A. D. 1915, at 3:40 o'clock P. M.

LEWIS CLINE,
County Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline County Clerk in and for the county and state above named, do hereby certify that the foregoing is a true and correct

copy of a like instrument now of record, in my office and recorded in Book 140, page 298.

Dated the 11th day of Jan., 1917.

[SEAL.]

LEWIS CLINE,
County Clerk.
O. G. WEAVER,
Deputy.

"EXHIBIT G."

Certificate.

STATE OF OKLAHOMA,
County of Creek, ss:

I, Harrison Arnold Court Clerk in and for Creek County, State of Oklahoma, hereby certify the within to be a true copy of the order in Case Number 433, F. B. In the Matter of the Estate of Jennie Samuel, Deceased, in the County Court, as the same appears on file and record in my office.

Dated this 16th day of January, 1917.

[SEAL.]

HARRISON ARNOLD,
County Clerk,
By GEORGIA ROUNDS,
Deputy.

STATE OF OKLAHOMA,
County of Creek:

In the County Court.

No. 433.

In the Matter of the Estate of Jennie Samuel, Deceased.

Order.

Now on this 14 day of December, 1915, there came on for hearing the petition of Feney Rogers and Samuel W. Brown, as guardian of the person and estate of Lina White, nee Lowe, nee Billie, incompetent, for an order of this court approving certain Quit Claim Deeds.

Said petitioner Feney Rogers appearing in person and by her attorney, James J. Mars and said Petitioner, Samuel W. Brown, as guardian of said incompetent, appearing in person and by his attorney, R. L. Wilkinson, and the court after hearing the evidence and being fully advised in the premises and upon consideration thereof, finds:

That the said Jennie Samuel was a full-blood Creek Indian, and duly enrolled as such, and that by reason thereof she had allotted to her the following described lands, to-wit:

SW4 of SW4 of Section 8, Township 18, North, Range 12 East and situate in Creek County, State of Oklahoma, and SW4 of NW4 and E2 of NW4 of Section 36, Township 18 North, Range 12 East, and situate in Tulsa County, State of Oklahoma,

and all containing 160 acres, more or less.

That said Jennie Samuel died intestate in Creek County, Oklahoma, on the 11th day of October, 1915, leaving as her sole and only heirs at law, Fency Rogers and Lina White, nee Lowe, nee Billie, and that said decedent had no issue born to her since the 4th day of March, 1906.

The court further finds that said Jennie Samuel, prior to her death, sold and conveyed 40 acres of said real estate above described, to-wit: SW4 of NW4 of Section 36, Township 18 North, Range 12 East, but at the time of her death was the absolute owner in fee simple of the balance of said allotment.

The court further finds that Fency Rogers, as an heir of Jennie Samuel, deceased, on the 30 day of November, 1915, made and execute to Lina White, nee Lowe, nee Billie, *ner* certain Quit Claim Deed conveying to said Lina White, nee Lowe, nee Billie, all of her right, title and interest in and to the SW4 of SW4 of Section 8, Township 18 North, Range 12 East, and the S2 of SW4 of NW4 of Section 36, Township 18 North, Range 12 East, of said allotment; and that Lina White, nee Lowe, nee Billie, an incompetent, by her guardian, Samuel W. Brown, on the 30 day of November, 1915, made and executed to Fency Rogers, his certain Quite Claim Deed, conveying to said Fency Rogers, all the right, title and interest of said incompetent in and to the NE4 of NW4 and N2 of SE4 of NW4 of Section 36, Township 18 North, Range 12 East, of said allotment, and both of said deeds were delivered to this court pending the approval thereof; and that prior to the execution of said deed by Samuel W. Brown, as guardian of said incompetent he first obtained the consent and authority of this court to execute the same.

The court further finds that the consideration of each of the above mentioned deeds and transfers is a partition and division of the interest of petitioners and grantors in said lands, and that each of said deeds should be by the court approved;

27 It is therefore, by the court considered, ordered, adjudged and decreed that the Quit Claim Deeds presented herewith be and they are hereby approved according to Section 9 of the Act of Congress approved May 27th, 1908.

[SEAL.]

VICK S. DECKER,
Judge of County Court.

Endorsement: No. 433, F. B. Jennie Samuel, Dec. Order. Received and filed in County Court, Creek County, Dec. 14, 1915, W. R. Casteel, Court Clerk, Creek County, By R. V. Holcomb. Rec. Book 1, page 82.

"EXHIBIT H."

Oil and Gas Mining Lease by Guardian, Under Order of Court.

Know all Men by these presents: That heretofore, on the 27th day of December, 1915, ——— as guardian of the estate of Luia Love, nee Billie, now Luia White, an incompetent, a minor filed in the County Court of Creek County, State of Oklahoma, his petition for leave to lease for oil and gas purposes, the land hereinafter described belonging to his said ward, and

Whereas, the said County Court, did, on the 27th day of December, 1915, make an order of sale, directing the said guardian, S. W. Brown, to sell at public sale, to the highest and best bidder an oil and gas lease on the land of his said ward for a term of five years and as much longer thereafter as oil or gas is found in paying quantities, and

Whereas, the said guardian sold said oil and gas lease to J. P. Williams on the 3rd day of January, 1916, as shown by his report of said sale to said court, and

Whereas, the said County Court did on the 3rd day of January, 1916, make an order confirming and approving said sale, and ordering and directing the said guardian to execute a lease to the said purchaser, in words and figures, to-wit:

"This cause coming on for final hearing before this court on this 3rd day of January, 1916, the same being the regular day of the January, 1916, term of said court, on the return of the guardian, S. W. Brown, and report of his proceedings under the order of sale heretofore made, and it having been proven that in pursuance of the said order of sale, as ordered by this court the said guardian sold
 at public sale to J. P. Williams an oil and gas mining lease
 28 on the land of his said ward, situated in Tulsa County, State of Oklahoma, to-wit:

The South One-half (S2) of the Southeast Quarter (SE4) of the Northwest Quarter (NW4)

of Section 36, Township 18, Range 12 and containing Twenty acres, more or less, for five years from January 3d, 1916, and as much longer thereafter as oil or gas is found in paying quantities and it appearing to the court that said purchaser, J. P. Williams, has paid a cash bonus of \$5.00 per acre, or a total of \$100.00 to the said S. W. Brown, as guardian, and it appearing that the said J. P. Williams is the highest and best bidder for said lease, and that said sale was made and conducted fairly and legally and in accordance with the order of this court, and it further appearing that the said bid of J. P. Williams, to-wit: The sum of \$5.00 per acre and royalty of one-eighth of all the oil produced and saved from the premises, or its equivalent in money, and the sum of \$150 per year for each gas well from which gas is marketed, is fair and adequate, and is not

disproportionate to the value of said oil and gas lease, and that a greater sum cannot be obtained;

"It is therefore ordered and adjudged by the court that the said sale of the said oil and gas lease to the said J. P. Williams be confirmed and approved, and it is ordered that the said guardian, S. W. Brown, execute to the said purchaser, J. P. Williams, an oil and gas lease and make return to this court for final action and approval.

"Done in open court, this 3rd day of January, 1916.

[SEAL.]

VICK S. DECKER,
*Judge of the County Court
in and for Creek County."*

Therefore this agreement, made and entered into in duplicate, the 3rd day of January, A. D. 1916, by and between S. W. Brown, as guardian of the estate of Luia Love, nee Billie, now Luia White, an incompetent, of Creek County, Oklahoma, party of the first part, lessor, and J. P. Williams party of the second part lessee,

Witnesseth, that the said party of the first part, for and in consideration of the sum of One Hundred Dollars, to him in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agree-

ments hereinafter contained on the part of the party of the
29 second part to be paid, kept and performed, has granted, demised and leased and let and by these presents does grant, demise, lease and let unto the said second party, heirs, successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, power stations and structures thereon to produce and take care of said products, for a term of five years from this date and as much longer thereafter as oil or gas is found in paying quantities, all that certain tract of land situated in the County of Tulsa, State of Oklahoma, as follows, to-wit:

The South One-half (S.2) of the Southeast Quarter (S.E.4) of the Northwest Quarter (N.W.4) of Section 26, Township 18, Range 12 and containing twenty acres, more or less.

In consideration of the premises the said party of the second part covenants and agrees:

1st. To deliver to the credit of the first party, her heirs or assigns, free of costs, in the pipe line to which he may connect the wells, the equal one-eighth part of all oil produced and saved from the leased premises.

2nd. To pay to the first party One Hundred Fifty (\$150.00) Dollars each year in advance for the gas from each well where gas only is found, while the same is being used off the premises, and the first party to have gas free of cost from any such well for * * * stoves and * * * inside lights in the principal dwelling house on said land during the same time by making her own connections with the well.

rd. To pay the first party for gas produced from any oil well used off the premises at the rate of One Hundred Fifty Dollars (\$150.00) per year, for the time during which such gas shall be used, said payment to be made each three months in advance.

The party of the second part agrees to complete a well on said premises within Twelve Months from the date hereof, or pay at the rate of Twenty (\$20.00) Dollars in advance for each additional month such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and the parties agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

The party of the second part shall not be bound by any change in the ownership of said land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance, or a duly certified copy thereof.

The party of the second part shall have the right to use the land for the production of costs, gas, oil and water produced on said land for operations thereon, except water from wells of first party. When requested by the first party, the second party shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 300 feet to the house or barn on said premises.

The second party shall pay for the damages caused by him to grow-crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

All payments which may fall due under this lease may be made directly to the lessor or deposited to his credit in Bank of Jenks, at Jenks, Oklahoma.

The party of the second part, his heirs, successors or assigns, shall have the right at any time, on the payment of One Dollar to the party of the first part, his successors, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and terminate; provided this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any of its terms, to recover possession of the leased land, or any part thereof, against or from the lessor, her heirs, executors, administrators or assigns, or any other person or persons.

All covenants and agreements herein set forth between the parties hereto shall extend to their heirs, executors, administrators, successors or assigns.

Witness the following signatures the day and year first above written.

S. W. BROWN,
Guardian of the Estate of Luia Love, nee
Billie, now Luia White, an Incompetent.

Witnesses:

JNO. F. KERRIGAN.
J. H. MCGONIGAL.

The above and foregoing lease is this 3rd day of January, 1916 by the court examined and approved concurrently with the order of confirmation thereof.

[SEAL.]

VICK S. DECKER,
Judge of the County Court of
Creek County, Oklahoma.

31 STATE OF OKLAHOMA,
County of Creek, ss:

On this third day of January, 1916, before me, the undersigned a notary public within and for the county and state aforesaid, personally appeared S. W. Brown, guardian of the estate of Luia Love, nee Billie, now Luia White, an incompetent, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal.

[SEAL.]

R. L. WILKINSON,
Notary Public.

My commission expires Oct. 23, 1917.

Filed for record at Tulsa, Oklahoma, the 4th day of Jan., 1916

[SEAL.]

LEWIS CLINE,
County Clerk.

By O. G. WEAVER,
Deputy.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, County Clerk, in and for the above named county and state, do hereby certify that the above and foregoing is a true and correct copy of an Oil and Gas Lease from S. W. Brown, Gdn to J. P. Williams as the same appears of record in this office and recorded in Book 155 at page 254.

Dated the 11th day of January, 1917.

LEWIS CLINE,
County Clerk.

"EXHIBIT I."

Whereas, The said County Court did on the 27th day of December, 1915, make an order of sale, directing the said guardian S. W. Brown, to sell at public sale to the highest and best bidder an oil and gas lease on the land of his said ward, for a term of five years and as much longer thereafter as oil or gas is found in paying quantities; and

Whereas, The said guardian sold said oil and gas lease to J. P. Williams on the 3rd day of January, 1916, as shown by his report of said sale to said court; and

Whereas, The said County Court did on the 3rd day of January, 1916, make an order confirming and approving said sale and ordering and directing the said guardian to execute a lease to said purchaser, in words and figures, to-wit:

"This cause coming on for final hearing before this court on this 3rd day of January, 1916, the same being a regular day of the January, 1916, term of said court, on the return of the guardian, S. W. Brown, and report of his proceedings under the order of sale heretofore made, and it having been proven that in pursuance of the said order of sale, as ordered by this court, the said guardian sold at public sale to J. P. Williams an oil and gas mining lease on the land of his said ward, situated in Tulsa County, State of Oklahoma, to-wit:

The South One-half (S. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section 36, Township 18, Range 12, and containing Twenty acres, more or less,

for five years from January 3rd, 1916, and as much longer thereafter as oil or gas is found in paying quantities, and it appearing to the said — that said purchaser, J. P. Williams has paid a cash bonus of \$5.00 per acre or a total of \$100.00 to the said S. W. Brown, as guardian, and it appearing that the said J. P. Williams is the highest and best bidder for said lease, and that said sale was made and conducted fairly and legally and in accordance with the order of this court, and it further appearing that the said bid of J. P. Williams, to-wit, the sum of \$5.00 per acre and royalty of one-eighth of all the oil produced and saved from the premises, or its equivalent in money, and the sum of \$15.00 per year for each gas well from which gas is marketed, is fair and adequate, and is not disproportionate to the value of said oil and gas lease, and that a greater sum cannot be obtained;

It is therefore order- and adjudged by the court that the said sale of the said oil and gas lease to the said J. P. Williams be confirmed and approved, and it is order- that the said guardian, S. W. Brown, execute to the said purchaser, J. P. Williams, an oil and gas lease and make return to this court for final action and approval.

Done in open court this 3rd day of January, 1916.

VICK S. DECKER,

Judge of the County Court of Creek County."

"EXHIBIT J."

75972.

Assignment of Oil and Gas Lease.

Know All Men by These Presents: That I, J. P. Williams, on the fourth day of January, 1916, for and in consideration of the sum of One Dollar and other valuable considerations, the receipt whereof is hereby acknowledged, do hereby assign, sell, transfer, and set over unto Western Rope and Cordage Company, a corporation, its successors or assigns, all my right, title and interest in and to an Oil & Gas Mining Lease, given and executed by S. W. Brown, as guardian of the estate of Lina Low, née Billie, now Lul White, an incompetent, to J. P. Williams, dated the third day of January, 1916, and recorded at Tulsa, Tulsa County, State of Oklahoma with the Register of Deeds, on the 4th day of January, 1916 in Book — of — page —, and covering the following described property to-wit:

The South One-half (S. 2) of the Southeast Quarter (S. E. 4) of the Northwest Quarter (N. W. 4) of Section Thirty-six in Township Eighteen of Range Twelve, lying and situate in Tulsa County Oklahoma.

To have and To Hold unto the said Western Rope and Cordage Company, its successors or assigns, according to the terms and condition in said lease. The said Western Rope and Cordage Company to perform all the conditions and covenants mentioned in said lease. That I am the lawful owner and holder of said oil and gas mining lease and the same is free from all incumbrances, and that I have good right and title to sell and assign the same.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

J. P. WILLIAMS.

STATE OF OKLAHOMA,

County of Tulsa, ss:

Before me, the undersigned, a notary public, in and for said county and state, on this fourth day of January, 1916, personally appeared J. P. Williams, to me personally known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses, purposes and considerations therein set forth. In witness whereof, I have hereunto set my hand and affixed my seal as such notary public, in the county and state aforesaid, on the fourth day of January, A. D. 1916.

[SEAL.]

M. E. HAMPE,
Notary Public.

My commission expires April 16, 1919.

Filed for record in Tulsa County, Oklahoma, Jan. 4, 1916, at 3:25 o'clock P. M.

[SEAL.]

LEWIS CLINE,
County Clerk.
O. G. WEAVER,
Deputy.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, County Clerk, in and for the county and
34 state above named, do hereby certify that the foregoing is a true
and correct copy of a like instrument now of record in my office
and recorded in Book 185, page 629.

Dated the 11th day of January, 1917.

[SEAL.]

LEWIS CLINE,
County Clerk.
By O. G. WEAVER,
Deputy.

"EXHIBIT K."

No. 89250.

Assignment of Oil and Gas Lease.

Whereas, On the seventh day of March, 1916, a certain oil and gas mining lease was made and entered into by and between J. P. Williams, of Jenks, Okla., lessor, and Western Rope and Cordage Company, a corporation, of Tulsa, Okla., covering the following described land in the County of Tulsa and State of Oklahoma, to-wit:

The South One-half ($\frac{1}{2}$) of the Southeast ($\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section Thirty-six (36), Township Eighteen (18), Range Twelve (12), and Northeast Quarter of the Northwest Quarter and the North Half of the Southeast Quarter of the Northwest Quarter Section Thirty-six (36), Township Eighteen (18), Range Twelve (12)——

Said lease being recorded in the office of the Register of Deeds in and for said County, in Book — page —, and

Whereas the said lease and all rights thereunder or incident thereto are now owned by Western Rope and Cordage Company, a corporation, of Tulsa, Oklahoma.

Now, therefore, For and in consideration of One Dollar (and other good and valuable considerations), the receipt of which is hereby acknowledged, the undersigned, the present owners, of the said lease and all rights thereunder or incident thereto, does hereby bargain, sell, transfer, assign and convey unto Anchor Oil Company, a Corporation, of Tulsa, Okla., all of our right, title and interest of the original lessee and present owner in and to the said lease and rights thereunder in so far as it covers the

The South One-half of the Southeast Quarter of the North-west Quarter of Section Thirty-six in Township Eighteen of Range Twelve,

together with all personal property used or obtained in connection therewith to Anchor Oil Company, a Corporation, of Tulsa, Okla., and their heirs, successors and assigns.

35 And for the same consideration, the undersigned for themselves, their heirs, successors, and representatives, does covenant with the said assignee, its heirs, successors, or assigns, that they are the lawful owners of the said lease and rights and interests thereunder and of the personal property thereon or used in connection therewith, that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens, and incumbrances, and that all rentals and royalties due and payable thereunder have been duly paid.

In witness whereof, the undersigned owners, and assignor has signed and sealed this instrument this seventh day of March, 1916,

WESTERN ROPE & CORDAGE COMPANY,
B. M. GESSEL,

[SEAL.]

Sec.-Treas.

Acknowledgment of Corporation.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Before me, the undersigned, a notary public, in and for said county and state, on this 6th day of January, 1917, personally appeared B. M. Gessel, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument, as its Sec. Treasurer and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

[SEAL.]

CHAS. N. SIMON,
Notary Public.

My Commission expires June 3, 1918.

STATE OF OKLAHOMA,
Tulsa County, Tulsa, Okla.:

I hereby certify that this instrument was filed for record in my office on Jan. 8, 1917, at 10:30 o'clock A. M. and duly recorded in book —, page —.

LEWIS CLINE,
County Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, County Clerk, in and for the county and state above named, do hereby certify that the foregoing is a true and correct copy of a like instrument, now of record in my office and recorded in book —, page —.

Dated the 11th day of Jan., 1917.

LEWIS CLINE,
County Clerk.
O. G. WEAVER,
Deputy.

[SEAL.]

Endorsements: Civil No. 4241. Anchor Oil Company, a corporation, Plaintiff, vs. W. H. Gray, et al., Defendants.
36 Petition. Superior Court, State of Oklahoma, County of Tulsa. Jan. 18, 1917. Filed. Frank Ingraham, Court Clerk. C. B. Chenault and George T. Brown, Attorneys for Plaintiff.

And thereupon, on the same day, to-wit, on the 18th day of January, 1917, there was filed in said cause a Præcipe for Summons; which said Præcipe for Summons, together with all endorsements thereon, is in the words and figures following, to-wit:

Præcipe for Summons.

In the Superior Court of Tulsa County, State of Oklahoma.

No. 4241.

ANCHOR LINE OIL CO.

VS.

W. H. GRAY et al.

To the Clerk of said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Tulsa County, State of Oklahoma, for the defendants W. H. Gray, F. D. McDonnell, F. C. Giddings, The Gulf Pipe Line Company, a corporation, to Sheriff Creek County, Okla.,

Amount claimed, \$100,000.00 and interest from the 6th day of June, 1916, at 6 per cent per annum.

Action brought for money judgment, damages, receiver, injunction.

Defendants required to answer on or before the 19th day of Feb., 1917.

Make summons returnable 29th day of January, A. D. 1917.
Dated this 19th day of January, A. D. 1917.

GEORGE T. BROWN,
C. P. CHENAULT,
Attorneys for Plaintiff.

Endorsements: No. 4241. Superior Court, Tulsa County, Okla. Præcipe for Summons. Superior Court, State of Oklahoma, County of Tulsa. Jan. 18, 1917. Filed. Frank Ingraham, Court Clerk. Issued.

And thereafter, to-wit, on the 19th day of January, 1917, a Summons was issued in said cause; which said Summons, together with all endorsements thereon, is in the words and figures following, to-wit:

37

Summons.

STATE OF OKLAHOMA,
Tulsa County, ss:

In the Superior Court.

No. 4241.

ANCHOR OIL COMPANY, Plaintiff,

vs.

W. H. GRAY et al., Defendant.

The State of Oklahoma, to the Sheriff of Tulsa County, Greetings:

You are Hereby Commanded to notify W. H. Gray, F. D. McDonnell, F. C. Giddings, The Gulf Pipe Line Company, a corporation, that they have been sued by Anchor Oil Co. in the Superior Court of Tulsa County, Oklahoma, and that Defendants must answer the petition of said Anchor Oil Co., filed against them in said Court, in the City of Tulsa, in said County, on or before the 19th day of Feb., 1917, or said petition will be taken as true and judgment rendered accordingly.

You will make due return on this summons on the 29th day of Jan., A. D. 1917.

In Witness Whereof, I have hereunto set my hand and fixed the seal of said Court in Tulsa, in said County, this 19 day of Jan., A. D. 1917.

FRANK INGRAHAM,
Court Clerk.

By HATTIE MAY PURDY,
Deputy.

[SEAL.]

Suit brought for Money judgment, damages, receiver and injunction.

If the defendant fail to answer, plaintiff will take judgment for the sum of \$100,000.00 with interest thereon at the rate of 6 per cent per annum from the 6 day of June, 1916, and cost of suit.

FRANK INGRAHAM,

Court Clerk.

By HATTIE MAY PURDY,
Deputy.

Sheriff's Return.

Received this writ Jan. 19, 1917, and served the same upon the following persons, defendants, within named, at the times following, to-wit:

W. H. Gray, Jan. 22, 1917;
F. D. McDonnell, Jan. 25, 1917;
F. C. Giddings, Jan. 22, 1917;

by delivering to each of said defendants, personally in said county, a true and certified copy of the within summons, with all the endorsements thereon.

Sheriff's Fees.

Service and return, first person	\$.50
Serving 3 additional persons75
4 copies Summons	1.00
Total	<u>\$2.25</u>

W. M. McCULLOUGH,

Sheriff.

By F. F. BOWLIN,
Deputy.

38 STATE OF OKLAHOMA,
Tulsa County, ss:

Received this writ this 19 day of Jan., 1917, and served the same on the within named Gulf Pipe Line Company, defendant corp., by delivering a copy thereof with all the endorsements thereon, duly certified by me to be a true copy thereof, to D. B. Catterlin, at Tulsa, County, on the 22 day of Jan., 1917, he being the Assistant Secretary of said defendant corporation at Tulsa County, Oklahoma, "no person being by said defendant corporation designated in said county upon whom summons can be served," and the president, chairman of the board of directors, or trustees, or other chief officer, cashier, treasurer, secretary or managing agent of said defendant corporation not being found in said county.

W. M. McCULLOUGH,

Sheriff.

By F. F. BOWLIN,
Deputy.

Endorsements: No. 4241. In Superior Court. Summons. Anchor Oil Co. vs. W. H. Gray, et al. Issued Jan. 19, 1917. Returnable Jan. 29, 1917. Ans. Due Feb. 19, 1917. C. P. Chenault & Geo. T. Brown. Superior Court, State of Oklahoma, County of Tulsa. Jan. 25, 1917. Filed. Frank Ingraham, Court Clerk.

And thereupon, on the same day, to-wit, on the 19th day of January, 1917, a Summons was issued in said cause; which said Summons, together with all endorsements thereon, is in the words and figures following, to-wit:

STATE OF OKLAHOMA,
Tulsa County, ss:

In the Superior Court.

No. 4241.

ANCHOR OIL COMPANY, Plaintiff,

vs.

W. H. GRAY et al., Defendant.

Summons.

The State of Oklahoma, To the Sheriff of Tulsa County, Greetings:

You Are Hereby Commanded to notify Charles Egan that they have been sued by Anchor Oil Co., in the Superior Court of Tulsa County, Oklahoma, and that Defendants must answer the petition of said Anchor Oil Co., filed against them in said Court, in the City of Tulsa, in said County, on or before the 19th day of Feb., 1917, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 29th day of Jan., A. D. 1917.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court in Tulsa, in said County, this 19 day of Jan., A. D. 1917.

FRANK INGRAHAM,

Court Clerk.

By HATTIE MAY PURDY,

Deputy.

[SEAL.]

39 Suit Brought for Money judgment, damages, receiver and injunction.

If the defendant fail to answer, plaintiff will take judgment for the sum of \$100,000.00 with interest thereon at the rate of 6 per cent per annum from the 6th day of June, 1916, and cost of suit.

FRANK INGRAHAM,

Court Clerk.

Sheriff's Return.

STATE OF OKLAHOMA,

Tulsa County:

Received this Writ, Jan. 19, 1917, and served the same upon the following persons, defendants within named, at the times following, to-wit: Charles Egan, Jan. 23rd, 1917, by delivering to said defendants, personally in said county a true and certified copy of the within summons, with all the endorsements thereon.

Sheriff's Fees.

Service and return, first person.....	\$.50
1 copy Summons.....	.25
Total.....	\$.75

W. M. McCULLOUGH,

Sheriff.

By F. F. BOWLIN,

Deputy.

Endorsements: No. 4241. In Superior Court. Summons. Anchor Oil Co. vs. W. H. Gray, et al. Issued Jan. 19, 1917. Returnable Jan. 29, 1917. Ans. Due Feb. 19, 1917. C. P. Chenault & Geo. T. Brown. Superior Court, State of Oklahoma, County of Tulsa. Jan. 24, 1917. Filed. Frank Ingraham, Court Clerk.

And thereafter, to-wit, on the 20th day of January, 1917, Præcipe for Summons was filed in said cause, which said Præcipe for Summons, together with all endorsements thereon, is in the words and figures following, to-wit:

In the Superior Court of Tulsa County, State of Oklahoma.

No. 4241.

ANCHOR OIL COMPANY

vs.

W. H. GRAY et al.

Præcipe for Summons.

To the Clerk of Said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Tulsa County, State of Oklahoma, for the defendants Charles Egan.

40 Defendants required to answer on or before the 20th day of February, 1917.

Make summons returnable 30th day of January, A. D. 1917.

Dated this 20 day of Jan., A. D. 1917.

GEORGE T. BROWN,
C. P. CHENAULT,

Attorney- for Plaintiff.

Endorsements: No. 4241. Superior Court, Tulsa County, Okla. Præcipe for Summons. Anchor Oil Co. vs. W. H. Gray et al. C. P. Chenault, Attorney. Superior Court, State of Oklahoma, County of Tulsa. Jan. 20, 1917. Filed. Frank Ingraham, Court Clerk. Issued.

And thereupon, on the same day, to-wit, on the 20th day of January, 1917, there was filed in said cause Notice of Application for Receiver; which said notice, together with all endorsements thereon, is in the words and figures following, to-wit:

STATE OF OKLAHOMA,
County of Tulsa, ss:

In the Superior Court for the County and State Aforesaid.

Civil. No. —.

ANCHOR OIL COMPANY, Plaintiff,

VS.

W. H. GRAY et al., Defendants.

Notice of Application for Receiver.

The defendants, W. H. Gray, Charles Egan, F. D. McDonnell, F. C. Giddings and the Gulf Pipe Line Company, a corporation, and each of them, are hereby notified that the plaintiff will, on the 29th day of January, 1917, at the hour of 9 o'clock A. M. of said day, at the court room of the above styled court in Tulsa, Oklahoma, apply to said court for an order appointing a Receiver in this action to take charge of, operate and conduct the business of producing oil and gas from the—

Amount claimed, \$1,000.00 and interest from the 6th day of June 1916, at 6 per cent per annum.

Action brought for money, damages, injunction, receiver.

East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East, in Tulsa County, Oklahoma;

and at said time and place will then and there introduce both oral and written testimony in behalf of the application for appointment of a Receiver; and you, and each of you, will be governed accordingly.

ANCHOR OIL COMPANY,
By GEO. T. BROWN,
C. P. CHENAULT,
Attorneys for Plaintiff.

Endorsements: No. 4241. Anchor Oil Co. vs. W. H. Gray, et al. Notice of Application for Receiver. Superior Court, State of Oklahoma, County of Tulsa; Jan. 20, 1917. Filed. Frank Ingraham, Court Clerk.

And thereafter, to wit, on the 29th day of January, 1917, there was filed in said cause Notice of Petition for Removal; which said notice, together with all endorsements thereon, is in the words and figures following, to wit:

In the Superior Court in and for the County of Tulsa, State of Oklahoma.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS,
and THE GULF PIPE LINE COMPANY, a Corporation, Defendants.

No. 4241, Civil.

Notice of Petition and Bond for Order of Removal.

To Messrs. C. P. Chenault and George T. Brown, Attorneys for Plaintiff:

Please take notice that the defendants will, on the 29th day of January, 1917, at 9 o'clock A. M. or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Eastern District of Oklahoma, in accordance with the petition and bond of defendants, copies of which are hereto attached.

Dated this 26th day of January, 1917.

C. S. WALKER AND
WEST, SHERMAN & DAVIDSON,
JAMES B. DIGGS,
Attorneys for Defendants.

Service of above notice is hereby acknowledged.

GEO. T. BROWN,
Att'y for Plf.
C. P. CHENAULT,
By G. T. B.

Endorsements: No. 4241 Civil. Anchor Oil Company, a Corporation, Plaintiff, vs. W. H. Gray, et al., Defendants. Notice of Petition for Removal. Superior Court, State of Oklahoma, County of Tulsa; Jan. 29, 1917, Filed. Frank Ingraham, Court Clerk. Law offices of West, Sherman & Davidson, 206-7-8 and 9, Palace Building, Tulsa, Okla.

And thereupon, on the same day, to wit, on the 29th day of January, 1917, there was filed in said cause a Petition for Removal; which said Petition for Removal, together with all endorsements thereon, is in the words and figures following, to wit:

In the Superior Court in and for Tulsa County, State of Oklahoma.

No. 4241, Civil.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

VS.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS, and THE GULF PIPELINE COMPANY, a Corporation, Defendants.

Petition for Removal.

To the Honorable Judge of the Court aforesaid:

Your petitioners respectfully show that they are the defendants in this action, which is of a civil nature, in equity, and that the matter or amount in dispute exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

That said action is in equity, is of a civil nature, and arises under the Constitution and laws of the United States.

That the defendants, W. H. Gray, Charles Egan and F. C. Giddings, were, prior to the commencement of the above entitled action, and at the time of the commencement of such action, in possession and occupancy of the lands and the premises involved, which are more particularly described as the East Half (E. 2) of the Northwest Quarter (N. W. 4) of Section Thirty-six (36), Township Eighteen (18) North, Range Twelve (12) East in Tulsa County, Oklahoma, under and by virtue of a certain departmental oil and gas mining lease, executed by Jennie Samuels, the original allottee of said land, a full-blood Creek Indian, enrolled opposite roll No. 5941, dated December 5, 1914, executed pursuant to the rules and regulations prescribed by the Secretary of the Interior, and duly approved by said Secretary of the Interior, and that a one-half interest therein of F. D. McDonnell was, on the 8th day of August, 1916, assigned to the defendant, F. C. Giddings, and thereafter, to wit, on the 5th day of September, 1916, the defendant F. C. Giddings assigned a one-fourth interest in and to said lease to the defendant W. H. Gray, and that said defendants, W. H. Gray, Charles Egan and F. C. Giddings were, prior to the time of, and at the time of the commencement of the above entitled action, engaged in working said property and in producing oil, and gas there-

from, and had drilled wells upon said premises for that purpose, and that the oil produced from said premises was being run to and taken by The Gulf Pipeline Company; that said oil and gas mining lease under which said operations were being prosecuted was taken, executed and approved under and pursuant to the Act of Congress approved May 27, 1908 (35 Stat. L. 312), entitled "An Act for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes and for other purposes," and duly filed with the United States Indian Superintendent for the Five Civilized Tribes, January 5, 1915, in accordance with the provisions of the Act of Congress of March 1, 1907 (34 Stat. L. 1015) that

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice,"

and as appears from the petition herein, long prior to the acquisition of any claim by the plaintiffs in said petition.

That said operations, consisting of the mining and production of oil from said property, were being carried on by said defendants, in conformity to the terms and provisions of said lease and of the rules and regulations of the Secretary of the Interior and the provisions of said Acts of Congress.

That this action is brought to have the plaintiff declared to be the owner of oil and gas mining leases and leasehold estates in and to the lands hereinbefore described, and the oil and gas in, under and upon the same, and entitled to the exclusive and sole possession of same for the purpose of appropriating and marketing the oil and gas therein and thereunder, and to declare that the defendants and each of them, and all persons claiming or to claim by, through or under them, be adjudged and declared to have no right, title, estate or interest in and to said property or any part thereof, and that the departmental oil and gas mining lease hereinbefore recited and the assignments thereof, be ordered cancelled of record, and that the defendants and each of them be adjudged and declared to have no power, authority or warrant to withhold the right of possession from plaintiff and that defendants and each of them be perpetually and forever forbidden and enjoined from interfering with the possession of the plaintiff in and to said property, and further enjoined and forbidden from entering into or upon said property or any part thereof, and for judgment

in behalf of plaintiff against the defendants for the sum of
 44 One Hundred Thousand Dollars (\$100,000.00), representing the value of oil alleged to have already been taken from the premises, and such other sums as the court may find, and for the appointment of a receiver, pending the final termination of the suit, to take possession of the property involved, and to hold the proceeds therefrom, pending the final termination of said action.

That, as will more fully appear from the said petition, it is alleged therein that the original allottee, Jennie Samuels, died intestate, on the 11th day of October, 1915, leaving surviving her as her only heirs at law, Fency Rogers, née Sarkachee, a full-blood Creek Indian, duly enrolled opposite No. 5939, and Lina White, formerly Lina Lowe, née

Billie, also a full-blood Creek Indian, and that said property descended to said heirs under and by virtue of the Act of Congress of May 27, 1908, hereinbefore referred to, and that subsequent to the execution of the departmental oil and gas mining lease hereinbefore mentioned by Jennie Samuels, and subsequent to the filing thereof in the Union Agency at Muskogee, as hereinbefore stated, two certain leases of said property were made, one by the said Lina White, or Lina Lowe, and one by the said Feney Rogers, née Sarkachee, both of which said leases were approved by the County Court of Creek County, Oklahoma, under the authority of said Act of May 27, 1908, and that the plaintiff, Anchor Oil Company, has become the owner of said oil and gas mining leases, and that it now claims a right in and by virtue of said leases superior and paramount to any right, title or interest of these defendants or either of them, and that said plaintiff, Anchor Oil Company, is the only person or corporation entitled to develop and operate said lands for oil and gas and to extract therefrom the oil and gas lying therein and thereunder, and that the said departmental oil and gas mining lease under which these defendants are operating is wholly null and void, and of no force and effect.

That the question of the force and effect of said several Acts of Congress, as well as of the Enabling Act by which the State of Oklahoma was admitted into the Union, approved June 16, 1906, entitled "An Act to enable the people of Oklahoma and of Indian Territory to form a constitution and state government and be admitted to the Union on equal footing with the original states, etc." (34 Stat. L. 267) and the legal effect of the execution of the departmental oil and gas mining lease hereinbefore recited, whereunder these defendants are now prosecuting their operations for oil and gas mining purposes upon said lands and of the filing thereof in the Union Agency

at Muskogee, and of the power and authority of the Secretary of the Interior to approve said lease, under said Acts of Congress, and of the effect of said approval, and the rights of these defendants under and by virtue of the making and filing of said lease as aforesaid, and the approval thereof, is directly involved, and that the whole controversy involved in this suit depends upon whether the said departmental oil and gas mining lease so taken under the authority of said Acts of Congress on said lands or the leases under which the plaintiff, Anchor Oil Company is now claiming, is superior in right, and of the power and authority of the Congress of the United States of America to regulate by law the matter of the leasing of lands by full-blood allottees in the Five Civilized Tribes for oil and gas mining purposes, all of which will more fully appear from the petition on file in this action and the exhibits thereto.

Your petitioners further respectfully state and show to the court that the plaintiff, Anchor Oil Company, is a corporation of the State of Oklahoma, and that the defendant, The Gulf Pipeline Company of Oklahoma, is also a corporation of the State of Oklahoma; that the defendants, F. D. McDonnell, Charles Egan and F. C. Giddings are also citizens and residents of the State of Oklahoma, but that the defendant, W. H. Gray, is not a citizen of the State of Oklahoma, but is a citizen and resident of the State of Texas, and is now, and was at

the time of the filing of the petition in this action, and had been for over 30 years prior to the filing of said petition, a citizen and resident of the State of Texas in the City of Houston, and that said defendant, W. H. Gray is still a citizen and resident of said City of Houston in said State of Texas.

That the time for your petitioners, the defendants in this action, to answer or plead to the petition in said action, has not yet expired, and will not so expire until the 19th day of February, 1917. Your petitioners have not filed any pleading therein, or in any way appeared therein.

That the controversy herein is between citizens of this state and a foreign state, in that the plaintiff, Anchor Oil Company, was at the time of the commencement of this suit and still is a citizen of the State of Oklahoma, and the defendant, W. H. Gray, was at the time of the commencement of this action and still is, a citizen and resident of the State of Texas, and that said defendant, W. H. Gray, desires to remove this suit before the trial thereof into the *United States District Court of the United States for the Eastern District of Oklahoma*.

6 Your petitioners further show that the causes of action that plaintiff has against the defendant, W. H. Gray, and the other defendants herein, are separable controversies and that said suit may be finally determined as between the plaintiff and said defendant, W. H. Gray, and complete relief afforded, without reference to the other defendants, for said suit is in substance and effect a suit to quiet title, and the interest of each of the said several defendants therein is a separate and distinct interest, and plaintiff could have brought suit against each of said defendants separately to try and determine the alleged rights asserted against them.

That the defendant, W. H. Gray, claims the ownership of a one-fourth interest in the departmental oil and gas mining lease hereinbefore referred to, said interest was acquired by assignment, separate and distinct from any of the other defendants, and is capable of being signed by said defendant, Gray, without his co-defendants joining therein, and that the interests of said W. N. Gray in said property is separate and distinct, and separable from the interests of his co-defendants, all of which will more fully appear from the petition filed herein and the exhibits to said petition.

Your petitioners herewith present a good and sufficient bond as provided by the statute in such cases, that they will enter in the District Court for the Eastern District of Oklahoma, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which may be awarded by the said court if the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners therefore pray that this court proceed no further herein, except to make the order of removal as required by law, and accept the bond presented herewith and direct a transcript of the

record herein to be made by the clerk for said court as provided by law, and as in duty bound your petitioners will ever pray.

CHAS. F. EGAN,
F. D. McDONELL,
F. C. GIDDINGS,
W. H. GRAY,
THE GULF PIPELINE COMPANY
OF OKLAHOMA,

By JAMES B. DIGGS,
Attorney in Fact.

47 In the Superior Court in and for Tulsa County, State of
Oklahoma.

No. 4241.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDonald, CHARLES EGAN, F. C. GIDDINGS, and
GULF PIPE LINE COMPANY OF OKLAHOMA, a Corporation, De-
fendants.

Affidavit.

James B. Diggs, being first duly sworn on oath, states:

That he has read the above and foregoing petition for removal, and he knows of his own knowledge the statement of facts in said petition contained to be true, and that he makes this affidavit for and on behalf of the Gulf Pipe Line Company of Oklahoma, and for the reason that he is the only agent, officer or employe of said company in the State of Oklahoma, who has personal knowledge of the facts therein stated.

JAMES B. DIGGS.

Subscribed and sworn to before me this 26 day of January, 1917.

[SEAL.]

W. S. LEVAN,

Notary Public.

My commission expires Aug. 14, 1920.

STATE OF OKLAHOMA,

County of Tulsa, ss:

W. H. Gray, F. D. McDonnell, Charles Egan, and F. C. Giddings, being each duly sworn, according to law, severally depose and say:

I am one of the petitioners in the above written petition for removal, and one of the defendants in the cause of action filed in the Superior Court of Tulsa County, State of Oklahoma, wherein Anchor Oil Company is plaintiff, and W. H. Gray, F. D. McDonnell, Charles Egan and F. C. Giddings and The Gulf Pipeline Company, a corporation, are defendants; that I have read the said petition and that the

matters and things set forth therein are true of my own knowledge, except in so far as the same constitute conclusions of law, as to which statements I verily believe them to be true.

CHAS. F. EGAN.
F. D. McDONELL.
F. C. GIDDINGS.
W. H. GRAY.

Subscribed and sworn to before me this 26th day of January, 1917.

[SEAL.]

RUTH DAVIDSON,

Notary Public.

My commission expires May 20, 1920.

Endorsements: No. 4241 Civil. Anchor Oil Company, a corporation, Plaintiff, vs. W. H. Gray, et al., Defendants. Petition
48 for Removal. Superior Court, State of Oklahoma, County of
Tulsa, Jan. 29 1917. Filed. Frank Ingraham, Court Clerk.
Law offices of West, Sherman & Davidson, 206-7-8 and 9, Palace
Building, Tulsa, Okla.

And thereupon, on the same day, to-wit, on the 29th day of January, 1917, there was filed in said cause a Bond; which said Bond, together with all endorsements thereon, is in the words and figures following, to-wit:

In the Superior Court in and for the County of Tulsa, State of
Oklahoma.

No. 4241, Civil.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS
and THE GULF PIPELINE COMPANY, a Corporation, Defendants.

Bond on Removal.

Know All Men by These Presents: That we, W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and The Gulf Pipeline Company of Oklahoma, a corporation, as principals, and The Massachusetts Bonding & Insurance Co., as surety, are held and firmly bound unto Anchor Oil Company, a corporation, plaintiff in the above entitled cause, its successors and assigns, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves and each of us, our heirs, successors, executors and administrators, jointly and severally by these presents.

The conditions of this obligation are such that:

Whereas, The said W. H. Gray, F. D. McDonnell, Charles Egan and F. C. Giddings, and The Gulf Pipeline Company, a corporation, have applied by petition to the Superior Court of the State of Oklahoma in and for the County of Tulsa, for the removal of a certain action therein pending, wherein Anchor Oil Company is plaintiff, and the said W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and The Gulf Pipeline Company, a corporation, are defendants, to the District Court of the United States for the Eastern District of Oklahoma, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed,

Now, Therefore, If your petitioners, the said W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and The Gulf Pipe Line Company a corporation, shall enter in said District Court of the

United States for the Eastern District of Oklahoma aforesaid,
 49 within thirty days from the filing of said petition, a certified copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said District Court in the Eastern District of Oklahoma, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

Signed at Tulsa, in Tulsa County, State of Oklahoma, this 25th day of January, 1917.

GULF PIPE LINE CO., OF OKLAHOMA.

By JAMES B. DIGGS,

Its Attorney in Fact.

CHAS. F. EGAN,

F. D. McDONELL,

F. C. GIDDINGS,

W. H. GRAY,

Principals.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

[SEAL.]

By M. L. BRAGDON,

Attorney in Fact.

Approved:

2-8-17,

[SEAL.] FRANK INGRAHAM,

Court Clerk.

By HATTIE MAY PURDY,

Deputy.

Endorsements: No. 4241 Civil. Anchor Oil Company, a corporation, Plaintiff, vs. W. H. Gray, et al., Defendants. Superior Court, State of Oklahoma, County of Tulsa; Jan. 28, 1917. Filed Frank Ingraham, Court Clerk. Bond. Law offices of West, Sherman & Davidson, 206-7-8 and 9, Palace Building, Tulsa, Okla.

And thereupon, on the same day, to-wit, on the 29th day of January, 1917, the following Order of Removal was entered in said cause, said Order being recorded in Journal No. 4 of said Court, at page 610 thereof:

In the Superior Court in and for the County of Tulsa, State of Oklahoma.

No. 4241, Civil.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS,
and THE GULF PIPE LINE COMPANY, a Corporation, Defendants.

Order of Removal.

This cause coming on for hearing upon the petition and bond of the defendants herein, for an order transferring this cause to the United States District Court for the Eastern District of Oklahoma,

and it appearing to the court that the defendants have filed
50 their petition for removal in due form of law, and that the defendants have filed their bond, duly conditioned, with good and sufficient sureties, as provided by law, and that defendants have given plaintiff due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said District Court.

Now, Therefore, Said petition and bond are hereby accepted, and it is hereby ordered and adjudged that this cause be and it is hereby removed to the United States District Court for the Eastern District of Oklahoma, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 29th day of January, 1917.

M. A. BRECKINRIDGE,

Judge.

Endorsed: Superior Court, State of Oklahoma, County of Tulsa, Jan. 29, 1917. Filed. Frank Ingraham, Court Clerk.

In the Superior Court within and for the County of Tulsa, State of Oklahoma.

No. 4241.

ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY et al., Defendants.

Certificate of Clerk.

I, Frank Ingraham, court clerk within and for the County of Tulsa, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record in the above entitled cause, as shown by the record of said court in said cause on file in my office.

Witness my hand and the seal of said court, this the 12 day of Feb., 1917.

FRANK INGRAHAM,
*Court Clerk in and for the County
of Tulsa, State of Oklahoma,*
By HATTIE MAY PURDY,
Deputy.

[SEAL.]

Endorsed: Filed Feb. 21, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 24th day of February, A. D. 1917, the Plaintiff filed Motion to Remand, which is in words and figures — follows:

In the United States District Court for the Eastern District of the State of Oklahoma.

Equity. No. —.

51 ANCHOR OIL COMPANY, a Corporation, Plaintiff,

vs.

W. H. GRAY, F. D. McDONNELL, CHAS. EGAN, F. C. GIDDINGS and
THE GULF PIPE LINE COMPANY OF OKLAHOMA, Defendants.

Motion to Remand.

Comes now the Anchor Oil Company, a corporation, plaintiff in the above entitled and numbered cause, and respectfully moves this Honorable Court for an order remanding said cause to the Superior Court within and for Tulsa County, Oklahoma, for trial, from whence it was removed, for the reasons following:

1.

Because said action is not one which could have been originally instituted in this court.

2.

Because there are no federal questions arising under the laws, treatise or Constitution of the United States involved to give this court jurisdiction to hear and determine this cause.

3.

Because both legal and equitable remedies are sought by the plaintiff in this action, and both legal and equitable causes of action being joined in its petition, which is permissible under the practice of the court of the State of Oklahoma, and that no federal question arises in either the legal or equitable causes of action declared upon by plaintiff in its petition, as appears from the face thereof.

4.

Because there is no controversy in this action between citizens of different states, said controversy being non-separable among the defendants herein, and all of said defendants being necessary and indispensable parties, in order to afford the relief demanded.

5.

Because this court has no jurisdiction of this action.

Wherefore, plaintiff prays that the said cause be by this court ordered remanded to the Superior Court of Tulsa County, at Tulsa, Oklahoma.

GEO. T. BROWN,
JOHN B. MESERVE,
C. P. CHENAULT,
Attorneys for Plaintiff.

Copy mailed to attorneys for defendants.

52 Endorsed: Filed Feb. 24, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 27th day of February, A. D. 1917, the defendants W. H. Gray, F. D. McDonnell, Charles Egan and F. C. Giddings filed Motion to Dismiss, which is in words and figures as follows:

Motion to Dismiss.

Now come the defendants, W. H. Gray, F. D. McDonnell, Chas. Egan and F. C. Giddings, and move to dismiss the complainant's bill for the reason that it fails to state any matter of equity entitling the complainant to the relief prayed for, and fails to state any facts sufficient to entitle the complainant to any relief against the defendants.

C. S. WALKER,
WEST, SHERMAN & DAVIDSON,
*Attorneys for Defendants, W. H. Gray, F. D.
McDonnell, Chas. Egan and F. C. Giddings.*

Endorsed: Filed Feb. 27, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 8th day of June, A. D. 1917, the same being one of the days of the Special Session of the United States District Court for the Eastern District of Oklahoma held at Muskogee, Oklahoma, Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following:

Order Overruling Motion to Remand and Submitting Motion to Dismiss.

Now on this 8th day of June, 1917, it is ordered that motion to remand is overruled. Motion to dismiss submitted. Defendant given 15 days to file brief. Plaintiff given 15 days thereafter to file answer brief. United States Attorney given leave to file brief in 15 days. It is further ordered that plaintiff is hereby given leave to amend its bill by interlineation.

53 And, to-wit, on the 21st day of June, A. D. 1917, the defendant Gulf Pipe Line Company filed its Motion to Dismiss which is in words and figures as follows:

Motion.

Comes now the Gulf Pipe Line Company of Oklahoma, sued under the name of the Gulf Pipe Line Company, and moves the court to dismiss the above styled action, and for grounds thereof, adopts the motion heretofore filed in this cause by the other defendants and asks that the same be treated as its motion the same as if the identical grounds were herein set out.

JAMES B. DIGGS,
RUSH GREENSLADE,
WILLIAM C. LIEDTKE,
*Attorneys for Gulf Pipe Line
Company of Oklahoma.*

Endorsed: Filed Jun- 21, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 17th day of July, A. D. 1917, the parties hereto filed Stipulation that the Amendment to the Petition shall be considered a part of the original bill, which Stipulation is in words and figures as follows:

Stipulation.

It is agreed between the parties plaintiff and defendants, that the pleading filed herein on the — day of July, 1917, styled "Amendment to Petition" is and shall be a part of the original petition and each paragraph thereof, and that the two pleadings contain the statements of alleged cause of action of plaintiff against defendants and shall be so treated and considered by the court in the trial of this action and the trial shall be had and judgment rendered as if the two pleadings constituted the original petition in this action; that all motions, demurrers, objections made or addressed to or affecting, or relating to the "Petition" or "Bill" shall be treated as applying to both as a whole.

54 This agreement is made with the knowledge, consent and acquiescence of the court.

C. P. CHENAULT,
GEO. T. BROWN,
JOHN B. MESERVE,

Attorneys for Plaintiff.
WEST, SHERMAN & DAVIDSON,

Attorneys for Defendants.

Endorsed: Jul. 17, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit on the 17th day of July, A. D. 1917, the Plaintiff herein filed Amendment to Petition, which is in words and figures as follows:

Amendment to Petition.

Comes now the plaintiff, Anchor Oil Company, under leave of Court and agreement of parties, and amends its original petition, or bill herein and for cause of action, reiterates, re-states, and adopts each and every allegation, averment and statement contained and set forth in its original petition and each paragraph thereof and makes the hereinafter statements, averments and allegations a part of said original petition and each paragraph thereof the same as if said allegations, averments and statements were fully copied and set forth therein. Plaintiff says that before and at the time of the purchase by it of its leasehold estate in said lands described in the original petition, from said Fency Rogers and Lina Lowe White, it had no information, knowledge or notice of the alleged lease of defendants or defendants' assignors and no information, knowledge

or notice of any rights, claims or interests of defendants or their assignors, in or to or about said lands and plaintiff acquired all of its alleged rights, interests and leasehold estate in said lands without information, notice or knowledge of any rights, claims or interests that defendants or their assignors had or may claim to have in said land whatsoever.

Plaintiff says that at and before the time defendants, their assignors entered upon said land and before drilling or developing said land for oil or gas or both, the defendants and their assignors had full knowledge and notice of plaintiff's lease, leasehold estate, rights, interests and claims, as herein set out and had written notice of plaintiff's rights, interests, claims and lease aforesaid, served on and delivered to them, their assignors, a copy of which
55 written notice is filed herewith as part hereof, same as if fully copied herein, and marked "Exhibit X."

Plaintiff files, herewith, as part hereof the same as if fully copied herein, a certified copy of the alleged lease under which defendants, their assignors claim right, title and interest in and to the land, oil and gas leasehold estate in said land, marked "Exhibit Y," and plaintiff says that defendants, and each of them, claim some right, title and interest in and to said land, lease, oil and gas leasehold estate in said land, adverse and paramount to the rights, claims, interests and oil and gas lease and oil and gas leasehold estate in and to said land, to plaintiff's rights, claims, interests, leases and leasehold estate, aforesaid.

Plaintiff says that it, the Anchor Oil Company at times herein mentioned, was the real owner and purchased of the rights, interests, leases and oil and gas leasehold estate in and to said land and the purchase and taking of legal or paper title by Williams and assignments to Western Rope and Cordage Company, was for the use and benefit of Anchor Oil Company; it paid the money and considerations for same, though the legal or paper title was taken in the name of ——— and Western Rope & Cordage Company, as hereinbefore alleged.

Wherefore, Plaintiff prays, as in its original petition, and for all proper relief to which in law or equity it may appear to be entitled.

C. P. CHENAULT,
GEO. T. BROWN,
JOHN B. MESERVE,
Attorneys for Plaintiff.

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Copy.

"EXHIBIT X."

Tulsa, Okla., July 28, 1916.

To F. D. McDonnell and Charles Egan,
Tulsa, Oklahoma.

You and each of you are hereby notified that the undersigned, Anchor Oil Company, claims the ownership of a valid and existing

oil and gas lease in, on and to the following described premises situated in Tulsa County, Oklahoma, to-wit:

The North 60 Acres of the East Half ($\frac{1}{2}$) of the Northwest Quarter ($\frac{1}{4}$) of Section 36, Township 18 North, Range 12 East, and also the South 20 Acres of the East Half ($\frac{1}{2}$) of said Northwest Quarter ($\frac{1}{4}$) of Section 36, township 18 N., Range 12 East.

The undersigned company has just been informed that you jointly claim to own an oil and gas lease on the above described premises, and have entered upon said premises and are now drilling thereon for oil or gas.

You are hereby notified by the undersigned Anchor Oil Company to cease any operations that you may be carrying on said land, and remove all property belonging to you therefrom.

If you fail, neglect or refuse to observe and comply with this notice and proceed to continue or carry on any operations on said premises, you do so at your peril, and the Anchor Oil Company will hold you responsible in the matter.

Yours truly,

ANCHOR OIL COMPANY,
By B. M. GESSEL.

"EXHIBIT Y."

Quadruplicate 31181.

8892.

Form A. Series 1908.—Approved April 20, 1908.

Amended February 6, and June 29, 1911. 5-25-16—10M.

Oil and Gas Mining Lease upon Land Selected for Allotment.

83173.

Creek Nation, Oklahoma.

This Indenture of lease, made and entered into in quadruplicate on this 5th day of December, A. D. 1914, by and between Jennie Samuels, of Sapulpa, enrolled as a full-blood citizen of the Creek Nation, Roll No. 5941, party of the first part, hereinafter designated as lessor, and F. D. McDonnell and Charles Egan, of Tulsa, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908, (35 Stat. L. P. 312) Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Creek and State of Oklahoma, to-wit: The East Half of the Northwest Quarter of section 36, township 18, range 12 of the Indian Meridian, and containing Eighty (80) acres, more or less,

with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease: Provided, further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of
 58 discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for lessor, as advanced annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in ad-

vance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligations to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be off-set if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a

workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boiler, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

60 6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder; Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

61 11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the household premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the First National Bank of Sapulpa, Okla., or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Attest:

JESSIE SAMUELS.	her thumb mark	[SEAL.]
F. D. McDONELL.		[SEAL.]
CHARLES EGAN.		[SEAL.]

Two witnesses to execution by lessor:

GEO. M. McDANIEL,
P. O., Sapulpa, Okla.
 ROBERT ROGERS,
P. O., Sapulpa, Okla.

Two witnesses to execution by lessee:

R. M. HUNTER,
P. O., Tulsa, Okla.
 J. N. HUNTER,
P. O., Tulsa, Okla.

62 STATE OF OKLAHOMA,
 County of Creek, ss:

Before me, a Notary Public in and for said county and state, on this 5th day of December, 1914, personally appeared Jennie Samuels to me known to be the identical person who executed the within and foregoing lease, by her mark, in my presence and in the presence of Geo. M. McDaniel & Robert Rogers, as witnesses *as witnesses*, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

[SEAL.]

LEVI M. JONES,
Notary Public.

My commission expires May 29, 1917.

Department of the Interior, Office of the Superintendent for the Five Civilized Tribes. Muskogee, Okla., Oct. 14, 1915. The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date. Joe H. Strain, Acting Superintendent for the Five Civilized Tribes.

Department of the Interior, Office of Indian Affairs, Washington, D. C., Oct. 20, 1915. Respectfully submitted to the Secretary of the Interior, with recommendation that it be approved. E. B. Merett, Assistant Commissioner.

Department of the Interior. Washington, D. C., Oct. 21, 1915. Approved. Bo. Sweeney, Assistant Secretary of the Interior.

Filed in the office of the Superintendent for the Five Civilized Tribes this 5 day of Jan., 1915, at 1 o'clock P. M. Gabe E. Parker, Superintendent, By D. W. Poor, Cashier.

Bonus, \$75.00; Advance Royalty Received, \$12.00; Total, \$87.00.

(Endorsements.)

Received Sup. 5 Civ. Tribes, Jan. 5, 1915. Enclosure to No. 1472.

Received Sup. 5 Civ. Tribes Oct. 29, 1915. Enclosure to Dept. No 6722.

Office of Indian Affairs, Received Oct. 18, 1915. 111696. Royalty No. 40917.

31181. Original. Department of the Interior, Gabe E. Parker, Superintendent, Muskogee, Okla: We, F. D. McDonell and Chas. Egan, hereby certify that we each own an undivided one-half interest

in the Oil and Gas Mining Lease given by Jennie Samuels on the 5th day of December, 1914, covering the East $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Section 36, Township 18, Range 12, East containing eighty acres. F. D. McDonell, Charles Egan. Received Supt. 5 Civ. Tribes, Feb. 10, 1915, enclosure to No. 15276.

Filed for record Tulsa County, Oklahoma, Aug. 10, 1916, at 4:20 o'clock P. M. (Seal) Lewis Cline, County Clerk. By O. G. Weaver, Deputy.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, County Clerk, in and for the above named County and State, do hereby certify that the above and foregoing is a true and correct copy of an Oil and Gas Lease from Jennie Samuels to F. D. McDonell and Charles Egan as the same appears of record in this office and recorded in Book 167 at page 148.

Dated the 11th day of Jan., 1917.

LEWIS CLINE,

County Clerk,

By O. G. WEAVER,

Deputy.

[SEAL.]

Endorsed: Filed Jul. 17, 1917, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 19th day of February, A. D. 1918, the court filed its opinion herein, which is in words and figures as follows:

Memorandum Decision.

CAMPBELL, D. J.:

This matter is pending on defendants' motion to dismiss which was heretofore argued orally and submitted upon briefs of counsel to be supplied, which have been filed and considered. In its amended petition the plaintiff sets forth a copy of the departmental lease under which the defendants claim, from which it appears that the full-blood Creek allottee, Jennie Samuels on December 5, 1914, executed this oil and gas lease to the defendants McDonell and Egan; that it was filed for record in the office of the Superintendent for the Five Civilized Tribes on January 5, 1915. It also appears that having taken the usual course through the department, it was approved by the Assistant Secretary of the Interior on October 21, 1915. The petition alleged that the allottee, Jennie Samuels, died on October 11, 1915, ten days before the lease was approved. The plaintiff de-
raigns its title from certain alleged heirs of Jennie Samuels,
whose conveyances are all dated subsequent to October 21,
1915, the date of the approval by the Secretary of the Interior of the lease under which the defendants claim. If the filing of this lease with the Superintendent for the Five Civilized Tribes on January 5, 1915, amounted to constructive notice to the world of its existence, and the death of the lessor, Jennie Samuels, prior to the actual approval of the lease by the Secretary of the Interior did not

affect the validity of such approval or the lease as so approved, then upon the face of the pleadings it appears the plaintiff is not entitled to the relief sought.

The questions here involved were decided by the Supreme Court of this state in an opinion recently filed, *Scioto Oil Co. v. O'Hern*, 169 Pac. 483, in which, as appears from the syllabi, the court held:

"Section 2, Art. 25, Williams' Ann. Const., which extended all laws in force in Oklahoma Territory to the State of Oklahoma, including the laws regulating the recordation of instruments affecting the title to real estate, did not repeal Act Cong. March 1, 1907, c. 2285, 34 Stat. 1015, which provided that the filing of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Ind. T., shall be deemed constructive notice, but said Act of March 1, 1907, survived, and an oil and gas lease filed in accordance therewith is effectual to impart notice to all persons subsequently dealing with the lands therein described.

Where C., a full-blood Creek citizen, executed an oil and gas lease upon his allotted land which lease was filed in the office of the United States Indian agent, Union Agency, at Muskogee, and C. died before its approval by the Secretary of the Interior, and the heirs of C. thereafter conveyed said lands by deed duly approved by the County Court, after which said lease was approved by the Secretary of the Interior, held, that the approval related back to the date of the lease, and the grantors in the deeds by the heirs of C. take title subject to said lease."

This I consider a well reasoned and well supported decision, and in my judgment states the law. The motion to dismiss will be sustained and the bill dismissed.

RALPH E. CAMPBELL,

Judge.

Endorsed: Filed Feb. 19, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

65 And, to-wit, on the 26th day of February, A. D. 1918, the following proceedings were had in this cause, Honorable Ralph E. Campbell, Judge presiding:

Order.

Now on this 26th day of February, 1918, comes on the above entitled and numbered cause for decision upon the motion of defendants to dismiss the plaintiff's bill herein, which said motion was submitted and orally argued in this court, on the 8th day of June, A. D. 1917, and taken under advisement by the court. The plaintiff at said time appearing by its attorneys, C. P. Chenault, George W. Brown and John B. Meserve, and the defendants appearing by their attorneys, C. S. Walker and West, Sherman & Davidson.

And it appearing to the court that the plaintiff, by leave of court, has amended its bill herein, and that the parties have stipulated and agreed that the original bill and the amendment thereto, styled amended petition, together contain the statements of the alleged cause

of action of plaintiff against defendants and shall be so treated and considered by the court, as if the two pleadings constituted the original petition in this action, and that all motions, demurrers and objections made or addressed to, or affecting or relating to, the petition or bill, shall be treated as applying to both as a whole.

And the court, being well and sufficiently advised in the premises,

It is, by the Court, Considered, Ordered, Adjudged and Decreed That the motion of defendants to dismiss the bill of complainant herein as amended be, and the same is hereby, sustained, and that said bill of complainant as so amended be, and the same is hereby, dismissed, and that the complainant, Anchor Oil Company, go hence without day. To which judgment, order and decree sustaining the said motion to dismiss, and dismissing the said bill of complaint as amended herein, the Anchor Oil Company, by its counsel, objected and excepted, and its exception is allowed.

RALPH E. CAMPBELL,

Judge.

O. K.

C. P. CHENAULT,

Att'y for Plff.

Endorsed: Filed Feb. 26, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 10th day of April, A. D. 1918, the Plaintiff filed Petition for Allowance of Appeal, together with his Assignment of Errors, which Appeal was allowed by the Court. Said Petition for Allowance of Appeal, Assignment of Errors and Order Allowing Appeal are in words and figures as follows:

Petition for Appeal.

The above named plaintiff conceiving itself aggrieved by the decree made and entered on the 28th day of February, 1918, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reason specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

GEO. T. BROWN,

JOHN B. MESERVE,

Attorneys for Plaintiff.

The foregoing claim of appeal is allowed in open court this 10th day of April, 1918.

RALPH E. CAMPBELL,

District Judge.

Endorsed: Filed Apr. 10, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Assignment of Errors.

Comes now the plaintiff in the above entitled cause, By George T. Brown and John B. Meserve, its attorneys, and says that the decree in said cause is erroneous and against the just rights of said plaintiff for the following reasons, and that the court erred:

I.

In overruling the motion of the plaintiff to remand this cause to the Superior Court of Tulsa County, State of Oklahoma, wherein said cause was originally lodged.

II.

In not sustaining the motion of the plaintiff to remand this cause to the Superior Court of Tulsa County, State of Oklahoma.

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III.

In the sustaining of the defendants' motion to dismiss plaintiff's petition.

IV.

In not overruling the motion of the defendants to dismiss plaintiff's petition filed herein.

V.

In dismissing plaintiff's petition out of this court.

VI.

In holding that the Secretary of the Interior had the power, after the death of the full-blood Indian lessor, to approve an oil and gas mining lease made by said full-blood Indian during his lifetime.

VII.

In holding that on the 5th day of January, 1915, the filing of an oil and gas mining lease with the Superintendent of the Five Civilized Tribes amounted to constructive notice.

VIII.

In holding that the death of a full-blood Indian lessor prior to the actual approval of an oil and gas mining lease by the Secretary of the Interior did not affect the validity of such approval or the lease so approved.

IX.

In rendering judgment in favor of the defendants and against the plaintiff.

Wherefore, the plaintiff prays that the said decree be reversed, and that the said court may be directed to reinstate said cause and the petition so dismissed in the United States Court for the Eastern District of Oklahoma.

GEO. T. BROWN,
JOHN B. MESERVE,
Attorneys for Plaintiff.

Endorsed: Filed Apr. 10, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

4 2

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Citation.

UNITED STATES OF AMERICA,
Eastern District, State of Oklahoma, ss:

To W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings
and Gulf Pipe Line Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit, to be held at the City of Saint Louis, State of Missouri, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein the Anchor Oil Company, a corporation is appellant, and W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a corporation, are appellees, to show cause, if any there be, why the judgment in said appeal mentioned shall not be corrected and speedy justice should not be done to the appellants in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 10th day of April, 1918, and the independence of the United States, one hundred forty-two.

RALPH E. CAMPBELL,
*United States District Judge for
the Eastern District of Oklahoma.*

Attest:

_____,
District Clerk,

By _____,
Deputy.

UNITED STATES OF AMERICA,
Eastern District, State of Oklahoma, ss:

We, the undersigned, attorneys of record for the appellees in the above entitled matter, hereby accept service of the above citation this 10th day of April, 1918.

WEST, SHERMAN, DAVIDSON & MOORE,
Attorneys for Appellees.

Præcipe for Record.

To R. P. Harrison, Clerk of the Above Named Court:

You are requested to make a transcript of the record in the above entitled cause, to be printed and filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to appeal allowed in said cause; to include in such transcript of record the following and no other papers.

1. Transcript from state court, filed February 21, 1917.
2. Motion to remand, filed February 24th, 1917.
3. Motion to dismiss, filed by W. H. Gray, F. D. McDonnell, Charles Egan and F. C. Giddings, filed February 27th, 1917.
4. Order overruling motion to remand and submitting to the court motion to dismiss.
5. Motion to dismiss filed by Gulf Pipe Line Company, June 21st, 1917.
6. Stipulation that amended petition shall be considered a part of the original bill, filed July 17th, 1917.
7. Amended petition filed July 17th, 1917.
8. Opinion of the court on motion to dismiss.
9. Order sustaining motions to dismiss and dismissing bill of complaint.
10. Petition for allowance of an appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Citation, with service.
14. Notice and election as to printed record (with service).
15. Certificate of clerk to record.

GEO. T. BROWN,
JOHN B. MESERVE,
Attorneys for Plaintiff.

We, the undersigned, attorneys for the defendants herein, do hereby acknowledge receipt of the above designation of parts of the record necessary for the consideration of the errors assigned by the plaintiff, and waive the designation of any other part or parts of the record, and agree that the above includes all of the portions of said record material or necessary for the consideration of the errors assigned.

Dated this 10th day of April, 1918.

WEST, SHERMAN, DAVIDSON
& MOORE,
Attorneys for Defendants.

Endorsed: Filed Apr. 16, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Election as to Printing Record.

70 The plaintiff herein elects to have a transcript of the record in the above cause printed under the supervision of the Clerk of the United States District Court for the Eastern District of Oklahoma, and respectfully requests that said transcript in said cause be printed as required by law under this election.

GEO. T. BROWN,
JOHN B. MESERVE,
Attorneys for Plaintiff.

Service of the above election as to printing record is acknowledged this 10th day of April, 1918.

WEST, SHERMAN, DAVIDSON
& MOORE,
Attorneys for Defendants.

Endorsed: Filed Apr. 16, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Anchor Oil Company v. W. H. Gray et al., Equity No. 2385, as was ordered by præcipe of counsel herein to be prepared and authenticated as the same appears from the records in my office.

I further certify that the Citation attached hereto and returned herewith is the original citation issued in this case.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the City of Muskogee, this 29th day of May, A. D. 1918.

[SEAL.]

R. P. HARRISON,

Clerk,

By H. E. BOUDINOT,

Deputy.

71 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Mr. George T. Brown and Mr. John B. Meserve as Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5177.

ANCHOR OIL COMPANY, Appellant,

vs.

W. H. GRAY et al.

The Clerk will enter my appearance as Counsel for the Appellant.

GEORGE T. BROWN.

JOHN B. MESERVE.

* (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun-7, 1918.

(Appearance of Mr. C. S. Walker, Mr. Rush Greenslade, Mr. William C. Liedtke and Meers. West, Sherman, Davidson & Moore as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

C. S. WALKER,
PRESTON C. WEST,
A. A. DAVIDSON,
ROGER S. SHERMAN,
GREY MOORE,

For Appellees Gray, McDonnell, Egan and Giddings.

RUSH GREENSLADE,
WILLIAM C. LIEDTKE,

For Gulf Pipe Line Co. of Okla.

72 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 10, 1918.

(Appearance of Mr. James B. Diggs as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.
JAMES B. DIGGS.

(Endorsed :) Filed in U. S. Circuit Court of Appeals, Sep. 11, 1918.

(Appearance of Mr. C. P. Chenault as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.
C. P. CHENAULT,
Suite, 307 Cosden Bldg.,
Tulsa, Okla.

(Endorsed :) Filed in U. S. Circuit Court of Appeals, Dec. 17, 1918.

(Order of Submission.)

December Term, 1918.

Tuesday, December 17, 1918.

This cause being this day called for hearing, argument was commenced by Mr. George T. Brown for appellant, continued by Mr. Preston C. West for appellees and concluded by Mr. George T. Brown and Mr. C. P. Chenault for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

73

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5177.

ANCHOR OIL COMPANY, a Corporation, Appellant,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS and
GULF PIPE LINE COMPANY, a Corporation, Appellees.

Appeal from the District Court of the United States for the Eastern
District of Oklahoma.

Mr. George T. Brown and Mr. Courtland P. Chenault (Mr. John B. Meserve was with them on the brief), for appellant.

Mr. Preston C. West (Mr. A. A. Davidson, Mr. C. S. Walker and Mr. James B. Diggs were with him on the brief), for appellees.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, *Circuit Judge*, delivered the opinion of the Court.

This case involves the validity of three oil and gas mining leases of eighty acres of land, one made on December 5, 1914, by Jennie Samuels, a full-blood Creek Indian, the allottee and grantee thereof, who died on October 11, 1915. This lease was filed in the office of the United States Indian Agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Oklahoma, on January 5, 1915, was approved by the Secretary of the Interior on October 21, 1915, and was first filed for record in the office of the County Clerk or Register of Deeds of the county in which the land is situated, on August 10, 1916. The defendants and appellees own this lease, and are in possession of and claim the right to mine the land for oil and gas thereunder.

The plaintiff and appellant, a corporation, claims a like right under two oil and gas mining leases, which it owns of sixty and twenty acres of this land made respectively by Feney Rogers and Lina White, full-blood Creek Indians and the sole heirs of Jennie Samuels. These leases were approved by the County Court having jurisdiction of the settlement of the estate of Jennie Samuels during the months of December, 1915, and January, 1916, and were recorded in the office of the County Clerk or Register of Deeds of the county where the land is situated prior to August 10, 1916, when Jennie Samuels' lease was first recorded and the lessees under the leases of Feney Rogers and Lina White, had no actual notice of the lease of Jennie Samuels until after they had respectively purchased and paid value for them in good faith. The facts which have been recited were disclosed by the petition of the plaintiff in which he prays for possession of the land, for an adjudication of the invalidity of the lease of Jennie Samuels, of the validity of the leases of her heirs, and for a recovery of damages on account of the possession and use of the land by the defendants. The court below dismissed the petition upon the motion of the defendants on the ground that the lease of Jennie Samuels was valid, and that the defendants' possession and their mining of the land thereunder were lawful.

Counsel for the plaintiff assail this conclusion on the ground that the Secretary was without jurisdiction or authority to approve the lease of Jennie Samuels, a full-blood Creek Indian, after her death, and that as his approval was not made until ten days after she died, her lease became void. In support of this position they argue that the authority of the Secretary to approve and thereby to perfect oil and gas mining leases of their allotments by full-blood allottees of the

Creek Tribe, which was granted by Section 20 of the Act of April 26, 1906, 34 Statutes 135, 137, 145, ceased at the death of the allottee, by reason of the provision of Section 9 of the Act of May 27, 1908, 35 Statutes 315, "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions

upon the alienation of the said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the Court having jurisdiction of the settlement of the estate of said deceased allottee". But where the validity of a conveyance of land or of leases thereof is conditioned by the approval of different officers or by different restrictions at different times, the law in force at the time of the deed or lease determines the restriction upon its validity, and where at that date a specified officer is empowered to approve and validate it, that officer or his successor in office, may lawfully do so after subsequent legislation has conditioned the validity of like conveyances or leases with the approval of a different officer or with different restrictions, and the true construction of Section 9 of the Act of May 27, 1908, is that it is prospective, and not retrospective in effect that it applies to conveyances and leases made after its passage and is inapplicable to those made before its enactment, and that the Secretary of the Interior had plenary authority to approve and validate the lease of Jennie Samuels after her death notwithstanding the provision of Section 9 of the Act of May 27, 1908. *Scioto Oil Co. v. O'Hern*, 169 Pac. (Okla.) 483; *Harris v. Bell*, and authorities cited in 250 Fed. at page 214.

Counsel insist, however, that the Secretary's power to approve the lease ceased because under Section 9 of the Act of 1908 the death of the lessor removed all restrictions upon alienation of the land. But that removal did not change the status of Jennie Samuels' lease, did not remove the restriction upon the alienation by her, for those restrictions persisted until she died and she could not alienate her land after her death. She had leased her land subject only to the approval of the Secretary, and her heirs so far as her lease was concerned stepped into her shoes upon her death. The lease estopped them as it did her from revoking it or conveying the land free from it, unless the Secretary, in the exercise of his judicial discretion, refused to approve it, and, when he approved it the estoppel became absolute upon all of them alike.

76 The only restrictions on alienation removed by her death were the restrictions on the alienation of the rights in the land which descended to her heirs upon her death and those rights were inferior and subject to the rights of the lessees of Jennie Samuels to the full benefit of the lease if it was subsequently approved by the Secretary.

It was so approved and then the lease became impregnable to the attacks of the heirs and those claiming under them with notice of the conditional lease. *Scioto Oil Co. v. O'Hern*, 169 Pac. (Okla.) 483; *Almeda Oil Co. v. Kelley*, 130 Pac. (Okla.) 931; *Pickering v. Lomax*, 145 U. S. 310; *Lykins v. McGrath*, 184 U. S. 169. Another contention of counsel for the plaintiff is, that the lease of Jennie Samuels was inferior in right to the leases of her heirs, (1) because it did not take effect until it was approved by the Secretary and that approval was made after the leases of her heirs had been made and had been duly approved and (2) because the lease of Jennie Samuels itself provided that the term thereof should be ten years from the date of its approval by the Secretary of the Interior and that "In event restric-

tions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease." But whether or not the lease of Jennie Samuels was inferior to the lease of her heirs depends upon the question whether or not the lessees in the latter lease had constructive notice of the former lease, a question which will be hereafter considered. There was nothing in her lease or in the conduct of the parties to it, to indicate any bad faith or any attempt to evade the restrictions on alienation imposed by the Act of Congress, and her lease was neither void nor voidable because the parties made and delivered it subject to the approval of the Secretary before the term of the lease commenced to run. Subject to that approval the parties to this lease, by the execution and delivery thereof estopped themselves and those claiming under them with notice of the lease, from denying, revoking or avoiding it when approved by the Secretary, except for fraud or mistake. And, when it was approved by the Secretary as

77 against the parties to it and those claiming under them with notice, it related back to and took effect as of the date of its execution by the parties named therein. *Pickering v. Lomax*, 145 U. S. 310, 314, 316; *Lomax v. Pickering*, 173 U. S. 26, 27; *Lykins v. McGrath*, 184 U. S. 169, 171, 172.

Nor is there anything in the clause of the lease regarding the removal of all restrictions to reverse or modify this result because all restrictions on alienation of the land never were removed until the Secretary approved the lease. The death of Jennie Samuels did not remove but perpetuated the restriction of her alienation of her land, for, after she died the only act which she had done by which the land could be alienated was her lease and the alienation by that lease was so restricted that it could have effect only when approved by the Secretary. Therefore, the condition on which alone the clause of the lease was to take effect never was fulfilled and the clause never became operative. Again, if all restrictions had been removed and if this clause had become lawful, valid and effective, its effect by virtue of the principle of relation would have been to have estopped Jennie Samuels and her heirs and those claiming under them with notice of the conditional lease from successfully assailing it. And the result is that the lease made by Jennie Samuels on December 5, 1914, and approved by the Secretary on October 21, 1915, was lawful and valid against all parties claiming under her or her heirs with notice that she had made such a lease.

Counsel for the plaintiff, however, say that, notwithstanding all this, it is entitled to prevail in this suit because it is a bona fide purchaser for value of the leases it owns without any notice of the lease of Jennie Samuels until after it had purchased and paid for the leases under which it asserts its right to this property. They urge that the lease made by Jennie Samuels was not filed or recorded in the office of the County Clerk or Register of Deeds of the county in which the land was situated until after the plaintiff had

made and paid for its leases, and had duly recorded them and the other evidences of its title from the heirs in the office of the County Clerk. This is conceded by the defendants. But the plaintiff's petition avers that on June 5, 1915, before the leases from the heirs under which the plaintiff claims were obtained, the lease of Jennie

Samuels was filed in the office of the United States Indian Agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Oklahoma, under and pursuant to the provision of the Act of Congress of March 1, 1907, which declares that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice", 34 Statutes 1026, and the defendants contend and the court below held that this filing charged the plaintiff and those under whom it claims with notice of that lease. Counsel for the plaintiff argue that this provision of the Act of Congress was either repealed or superseded by the admission of the state of Oklahoma into the Union, and by the provisions of the Enabling Act of Oklahoma, of the constitution and of the schedule to the constitution of that state which became effective November 16, 1907, a few months after the Act of Congress of March 1, 1907. This argument presents the second question in this case, the question whether or not the Act of March 1, 1907, was still in force when the plaintiff obtained its leases.

When the Act of March 1, 1907, was passed and when the Enabling Act, the Constitution of Oklahoma and the schedule to it took effect, there were in force in the Territory of Oklahoma and since have remained in force in the State of Oklahoma, these provisions with reference to the execution and record of instruments relating to real estate which may be found in Sections 1154 and 1155, Revised Laws of Oklahoma, 1910. "No deed, mortgage, contract, bond, lease or other instrument, relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided".—Section 1154. "Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrances or creditors."—Section 1155.

The provisions of the Enabling Act, the constitution, and the Schedule to it invoked, together with the statutes just recited to nullify the provision of the Act of Congress in question are these: Section 1 of the Enabling Act provides: "That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or to affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this

Act had never been passed". 34 Statutes at Large 267, Revised Laws of Oklahoma of 1910, page LXXIII.

Section 21 contains this clause: "And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States". 34 Statutes at Large 277, 278, Revised Laws of Oklahoma, 1910, page LXXIII.

Section 2 of the Schedule to the Constitution of Oklahoma declares that: "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law". Revised Laws of Oklahoma 1910, page CXCIX.

But careful study of these provisions of the Statutes of the Enabling Act and of the Constitution of Oklahoma and its Schedule and a comparison of them, with that part of the Act of Congress of March 1, 1907, which declares that the filing of a lease with the Indian Agent shall be deemed constructive notice, fails to convince that they either have or were intended to have the effect of repealing or superseding that provision. In the first place none of them expressly or by the plain meaning of its terms repeals or modifies or limits its effect, and the legal presumption from this fact is that neither the United States nor the State intended so to do. In the second place the subject matter of the Indians, their lands, the allotment and distribution of those lands to the Indians in severalty, the leases, sales, deeds and disposition by the allottees of their lands, the restrictions upon their alienation thereof, the extent of the rights and privileges of their lessees and claimants to this land, were and had been for more than a century within the exclusive jurisdiction of the United States and beyond the jurisdiction of the States, except in cases where the United States had renounced or released its control, and the legal presumption, evidenced and sustained by Section 1 of the Enabling Act, was and is that Nation and State alike intended to maintain that relation and situation wherever they have not by the plain terms of their legislation disclosed a contrary purpose. And no legislation or action exhibiting such a purpose is perceived in the statutes, the Enabling Act, the Constitution or the Schedule, to which reference has been made.

Again, the portion of the Act of the United States of 1907 relating to the constructive notice given to subsequent purchasers and others, by the filing with the Indian Agent, of a lease of an allotment of Indian land, was special legislation, limited in its terms and effect to a single subject, leases of Indian lands and to a particular class of persons, those affected by such leases, while the statutes of Oklahoma upon this subject of the constructive notice resulting from the recordation of instruments relating to real estate, were

general in their nature, treating of all classes of such instruments and of all classes of persons affected thereby. It is a cardinal rule of the construction of statutes that specific legislation in relation to a particular class or subject is not affected by general legislation in regard to many classes or subjects, of which that covered by the specific legislation is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed to have intended thereby to modify or repeal it; but the special and the general legislation must stand together, the former as the law of the particular class or subject, and the latter as the general law upon other subjects or classes within its terms. *State v. Stoll*, 17 Wall. 425, 436; *Washington v. Miller*, 235, U. S. 422, 427, 428; *Harris v. Bell*, 250 Fed. 209, 216, * * * C. C. A. * * *; *Stoneberg v. Morgan*, 246 Fed. 98, 101, 158 C. C. A. 324; *Sweet v. United States*, 228 Fed. 421, 427, 143 C. C. A. 3; *Priddy v. Thompson*, 204 Fed. 955, 958, 959, 123 C. C. A. 277, 280, 281; *Christie Street Commission Co. v. United States*, 136, Fed. 326, 333, 69 C. C. A. 464, 471. If the portion of the Act of March 1, 1907, relating to the constructive notice result-

ing from the filing of a lease of an allotment of Indian land
81 and the provisions of Sections 1154 and 1155 of the Revised

Statutes of Oklahoma 1910 had been enacted by a legislative body of the same state they might have stood and have been enforced together under this rule. By so much the more should they and must they so stand and be enforced now that the one is the Act of the Nation which has general and exclusive jurisdiction of the subject and class of which it treats and the others are the Acts of the State which has jurisdiction over all similar subjects and classes, but none over this one.

In the opinion of this court the portion of the Act of March 1, 1907, which relates to the constructive notice given to subsequent purchasers and others by the filing of a lease made by an allottee of an allotment of Indian land made by the United States, was neither repealed, annulled or modified by the subsequent admission of Oklahoma into the Union, by the recordation statutes of the Territory or State found in Revised Laws of Oklahoma of 1910, Sections 1154 and 1155, by the Enabling Act, the Constitution or the Schedule to the Constitution of that State. And if upon an independent investigation of the questions in this case any doubt had remained, the clear, concise and conclusive opinion of the Supreme Court of Oklahoma in *Scioto Oil Co. v. O'Hern*, 169 Pac. 483 would have dispelled it.

Let the decree below be affirmed with costs against the appellant.

Filed March 24, 1919.

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Monday, March 24, 1919.

No. 5177.

ANCHOR OIL COMPANY, a Corporation, Appellant,

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIDDINGS
and GULF PIPE LINE COMPANY, a Corporation.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a corporation, have and recover against the Anchor Oil Company, a corporation, the sum of twenty dollars for their costs herein and have execution therefor.

March 24, 1919.

(Petition for Appeal to Supreme Court U. S. and Order Allowing Same.)

The above named plaintiff and appellant, Anchor Oil Company, a corporation, conceiving itself aggrieved by the decree and judgment entered on the 24th day of March, A. D. 1919, in the above entitled and numbered cause, does hereby appeal from said decree and said judgment to the Supreme Court of the United States, and prays that this its appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree and order

83 was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEO. T. BROWN,
C. P. CHANAULT,

*Of Tulsa, Oklahoma, Attorneys for Plaintiff
and Appellant, Anchor Oil Company.*

Appeal to Supreme Court of the United States allowed this fourteenth day of June, 1919.

WALTER H. SANBORN,
*Senior United States Circuit Judge
for the Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 14, 1919.

(Assignment of Errors on Appeal to Supreme Court, U. S.)

Comes now the Anchor Oil Company, a Corporation of Tulsa, Oklahoma, plaintiff and appellant, named in the above entitled and numbered cause, by its attorneys Geo. T. Brown and C. P. Chenault, and says that the decree and judgment rendered in the above entitled and numbered cause, under date of March 24, 1919, by the United States Court of Appeals of the Eighth Circuit, is erroneous and against the just rights of said plaintiff, and that in said record and proceedings there is manifest error in the following respects and particulars, to wit:

I. That said Court erred in holding that the Secretary of the Interior had jurisdiction and authority to approve, after the death of the full blood Creek Indian, allottee, the oil and gas mining lease entered into between said allottee and the respondents prior to the death of said allottee.

II. Said Court erred in holding that the heirs of said deceased full blood Creek Indian, took the lands of said allottee subject to the unapproved oil and gas mining lease made by the allottee during her lifetime.

84 III. Said Court erred in holding that the Act of Congress of March 1, 1907, providing that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee Indian Territory, shall be deemed constructive notice," was not repealed and superseded by the Act of Congress authorizing the admission of the State of Oklahoma into the Union as a sovereign State, effective November 16, 1907.

IV. Said Court erred in holding that the recording laws of the State of Oklahoma with reference to the recording of instruments relating to real estate, did not apply to departmental oil and gas mining leases, after the formation of said State.

V. Said Court erred in holding that the filing of the oil and gas lease, claimed by Respondents, with the United States Indian Agent, Union Agency at Muskogee, Oklahoma, on the 5th day of January, 1915, was constructive notice thereof.

VI. Said Court erred in sustaining Respondents' Motion to dismiss Plaintiff's petition.

VII. Said Court erred in affirming the judgment of the District Court of the United States for the Eastern District of the State of Oklahoma.

VIII. Said Court erred in dismissing plaintiff's petition.

IX. Said Court erred in rendering judgment in favor of Respondents and against the Plaintiff.

Wherefore, the plaintiff prays that the order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, be reversed, and that said Court be ordered to enter an order and judgment overruling the Respondents' motion to dismiss, and that said Court be further directed and ordered to re-instate said cause and the petition of the plaintiff so dismissed in said Court and in the United States Court for the Eastern District of Oklahoma.

GEO. T. BROWN,
C. P. CHANAULT,
Attorneys for Plaintiff.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Jun. 14, 1919.

85 *(Bond on Appeal to Supreme Court, U. S.)*

Know all men by these presents:

That we, Anchor Oil Company, a corporation, as Principal and H. M. Preston as Surety, both of Tulsa, Tulsa County, State of Oklahoma, are held and firmly bound into W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a Corporation, in the sum of Five Hundred (\$500.00) Dollars to be paid to the said W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a Corporation, for the payment of which well and truly to be made we bind ourselves and each of us, and our respective heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 11 day of June A. D. 1919.

The condition- of the above undertaking are as follows, to wit:

That, whereas, the above named principal Anchor Oil Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree and judgment rendered in the above entitled and numbered cause by the United States Circuit Court of Appeals for the Eighth Circuit, under date of March 24, 1919;

Now, therefore, if the above named principal, Anchor Oil Company, shall prosecute said appeal to effect and answer all costs if it fails to make its said plea and appeal good, then this obligation to be void, otherwise the same shall be and remain in full force, virtue and effect.

ANCHOR OIL CO.,
By P. A. MISERNAN,
Sec'y, Principal.
H. M. PRESTON,
Surety.

Approved:

WALTER H. SANBORN,
Senior U. S. Circuit Judge, Eighth Circuit.

Sealed and delivered, taken and acknowledged before me, the undersigned, Notary Public, within and for Tulsa County, Oklahoma, by the said Anchor Oil Company, a corporation and the said H. M.

Preston surety, each of whom acknowledged to me the same to have been executed as their free and voluntary act and deed, on this, the 11th day of June A. D. 1919.

[SEAL.]

W. C. CONNELLY,

Notary Public.

My Commission Expires April 17, 1920.

UNITED STATES OF AMERICA,

State of Oklahoma,

County of Tulsa, ss:

Be it remembered that before me the undersigned a Notary Public, duly commissioned and acting withing and for said County and State, on this 11 day of June A. D. 1919, personally appeared H. M. Preston of lawful age, who after being duly sworn on oath, states; that he is the surety named in the above and foregoing undertaking, and that he is worth the sum of Three Thousand (\$3,000.00) Dollars, over and above all his exemptions, debts and liabilities.

H. M. PRESTON.

Subscribed and sworn to before me this 11th day of June A. D. 1919.

[SEAL.]

W. C. CONNELLY,

Notary Public.

My Commission Expires April 17, 1920.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 14, 1919.

87 UNITED STATES OF AMERICA:

To W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a corporation, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Anchor Oil Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Senior United States Circuit Judge in and for the Eighth Circuit, this fourteenth day of June A. D. 1919.

WALTER H. SANBORN,

Senior United States Circuit

Judge for the Eighth Circuit.

UNITED STATES OF AMERICA,
State of Oklahoma,
County of Tulsa, ss:

We, the undersigned, Attorneys of Record, for the Respondents named in the above entitled and numbered cause, hereby accept service of the above and foregoing citation this, the 16th day of June A. D. 1919.

WEST, SHERMAN & DAVIDSON,
Attorneys for W. H. Gray, F. D. McDonnell,
Charles Egan and F. C. Giddings,
JAMES B. DIGGS,
Attorneys for Gulf Pipe Line Company.

[Endorsed:] No. 5177. Anchor Oil Company, a corporation, Appellant, vs. W. H. Gray et al. Citation on Appeal to Supreme Court, U. S. Filed Jun. 18, 1919. E. E. Koch, Clerk.

88

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause wherein the Anchor Oil Company, a corporation, was Appellant, and W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings and Gulf Pipe Line Company, a corporation, were Appellees. No. 5177, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-eighth day of May, A. D. 1919, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Oklahoma.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this first day of July, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.*

Endorsed on cover: File No. 27,330. U. S. Circuit Court Appeals, 8th Circuit. Term No. 575. Anchor Oil Company, appellant, vs. W. H. Gray, F. D. McDonnell, Charles Egan et al. Filed October 20th, 1919. File No. 27,330.

U. S. S.
JAMES S. HANER
CLERK

In the

SUPREME COURT OF THE UNITED STATES

ANCHOR OIL COMPANY, a Corporation

Appellant

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES
EGAN, F. C. GIDDINGS, and THE GULF
PIPE LINE COMPANY, a Corporation,

Appellees.

No. 188

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF APPELLANT

JOHN DEVERAUX,
Counsel for Appellant

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In the

SUPREME COURT OF THE UNITED STATES

ANCHOR OIL COMPANY, a Corporation - -
- - - - - *Appellant*

VS.

W. H. GRAY, F. D. McDONNELL, CHARLES
EGAN, F. C. GIDDINGS, and THE GULF
PIPE LINE COMPANY, a Corporation, -
- - - - - *Appellees.*

No. 575

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE

This is a suit in equity, instituted by the Appellant, Anchor Oil Company, a Corporation, against the Appellees, W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings, and The Gulf Pipe Line Company, a Corporation, in the Superior Court of Tulsa County, State of Oklahoma, affecting title and ownership of the oil and gas mining leasehold estate in and to a certain Creek Indian allotment, situated in said Tulsa County, Oklahoma. On the petition of the Appellees, the case was removed to the District Court of the United States for the Eastern District of Oklahoma, after which the Appellees filed their Motion to Dismiss.

Upon the hearing of said motion, the same was by the said District Court sustained and final decree entered in that Court on the 19th day of February, A. D., 1918, dismissing plaintiff's petition.

Thereafter the said District Court allowed the plaintiff an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and plaintiff's appeal was duly and properly lodged in that Court. On hearing in the said Circuit Court of Appeals the judgment and decree of the District Court was affirmed.

The cause is now here for review on appeal from the judgment and decree of the said Circuit Court of Appeals affirming the judgment of the said District Court.

ABSTRACT OF APPELLANT'S PETITION

The particular allegation of facts contained in Appellant's petition necessary to consider in this discussion, is as follows, to-wit:

The lands in question were duly allotted by the Department of the Interior of the United States, to one Jennie Samuels, a full-blood adult citizen of the Creek Tribe or Nation of Indians, as her distributive share of the lands of said Tribe. On December 5, 1914, the allottee executed an oil and gas mining lease on the forms prescribed by the Department of Interior in such cases, to the Appellees, McDonnell and Egan. Subsequently the other Appellees acquired by contract with McDonnell and Egan, respective interests in said alleged oil and gas mining lease. This Departmental lease was filed for approval or rejection by the Secretary of the Interior, with the Superintendent for the Five Civilized Tribes, at Muskogee, Oklahoma, on January 5, 1915. Under date of October 21, 1915, the Assistant Secretary of the Interior at Washington, D. C., noted his approval in writing of said Departmental oil and gas mining lease. Prior thereto, however, to-wit: under date of

October 11, 1915, the allottee, Jennie Samuels, died intestate, in and while a resident of Creek County, Oklahoma, leaving as her heirs Feney Rogers, nee Sarkachee, and Lina White, formerly Lina Lowe, nee Billie, both of whom were likewise citizens of the Creek Tribe or Nation of Indians of the full blood.

It is further alleged in the petition, that in the month of December, 1915, these heirs, who were then the owners and holders of the fee simple title in and to said property by inheritance, under proper orders of the County Court, of Oklahoma, having jurisdiction of the estate of said decedent, as provided by section 9 of the Act of Congress of May 27, 1908, did make, execute and deliver their certain respective oil and gas mining leases covering said lands to one J. P. Williams, the Appellant acquired the title in and to the leases last above mentioned. The petition as shown in the transcript of the record derains the title of Appellant in detail and attaches copies of all instruments, orders and etc., in its chain of title.

It is further alleged in the petition and amendment thereto as shown in the record, that the Appellant and its assignors duly performed all of the terms, covenants and conditions to be by them done, kept and performed in accordance with the terms and stipulations contained in the oil and gas mining leases, so held and owned by Appellant, and had paid all rentals due thereunder; that before the Appellees entered upon said lands and commenced any drilling operations thereon under their purported Departmental oil and gas mining lease, they had full notice and knowledge of the claims and rights of the Appellant, in and to the same; and that under date of July 28, 1916, Appellant served written notice upon the Appellees of its rights, and claims in and to the premises, and further notified them not to enter upon said premises and not to carry on any drilling operations thereon. At this time and prior thereto,

it further appears that the chain of title under which the Appellant claimed, was duly filed for record in the office of the County Clerk, within and for Tulsa County, Oklahoma, same being the county in which said lands are situated, and that office being the recording office for land titles under the laws of the state of Oklahoma.

It further appears from the Departmental oil and gas mining lease claimed by the Appellees as shown in the record, that that instrument was not filed for record until August 10, 1916, which was long subsequent to the acquisition of the title to the premises by Appellant and its assignors.

The petition further alleges that Appellant had no actual knowledge or notice, at the time it acquired said interest in said lands, of the existence or of the execution of the said alleged Departmental oil and gas mining lease, and that Appellees, contrary to the notice served upon them by the Appellant, as aforesaid, and in utter disregard of the rights of the Appellant in and to the said lands and without the consent, notice or knowledge of Appellant, did obtain possession of said lands and commenced the drilling thereon for oil and gas mining purposes, in the course of which they discovered and produced petroleum oil and natural gas in large and paying quantities, to-wit: of the value of \$100,000.00, and that they were continuing in the operation of said lands for oil and gas mining purposes and appropriating the production thereof to their own use at the time of the institution of said action.

The petition prays judgment enjoining the Appellees from interfering with the possession of Appellant in and to said lands, for the purpose of its said lease, quieting the title of the Appellant's oil and gas leasehold estate therein; for an accounting of the oil and gas removed therefrom by Appellees; for the appointment of a Receiver; and for general relief.

The motion to dismiss is in the nature of a general demurrer for lack of equity and failure to state any facts sufficient to entitle the plaintiff to any relief. (Record, page 50).

The memorandum decision of the Court below is shown in full at pages 63-64 of the record and specifically follows a case decided by the Supreme Court of Oklahoma entitled "*Scioto Oil Company v. O'Hern*, 169 Pac. 483."

ASSIGNMENT OF ERRORS

The following errors are assigned (Record, pages 75-76):

I.

"That said Court erred in holding that the Secretary of the Interior had jurisdiction and authority to approve, after the death of the full blood Creek Indian, allottee, the oil and gas mining lease entered into between said allottee and the respondents prior to the death of said allottee.

II.

Said Court erred in holding that the heirs of said deceased full blood Creek Indian, took the lands of said allottee subject to the unapproved oil and gas mining lease made by the allottee during her lifetime.

III.

Said Court erred in holding that the Act of Congress of March 1, 1907, providing that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee Indian Territory, shall be deemed constructive notice," was not repealed and superseded by the Act of Congress authorizing the admission of the State of Oklahoma into the Union as a Sovereign State, effective November 16, 1907.

IV.

Said Court erred in holding that the recording laws of the State of Oklahoma with reference to the recording of in-

struments relating to real estate, did not apply to departmental oil and gas mining leases, after the formation of said State.

V.

Said Court erred in holding that the filing of the oil and gas lease, claimed by Respondents, with the United States Indian Agent, Union Agency at Muskogee, Oklahoma, on the 5th day of January, 1915, was constructive notice thereof.

VI:

Said Court erred in sustaining Respondent's Motion to dismiss Plaintiff's petition.

VII.

Said Court erred in affirming the judgment of the District Court of the United States for the Eastern District of the State of Oklahoma.

VIII

Said Court erred in dismissing plaintiff's petition.

IX.

Said Court erred in rendering judgment in favor of Respondents and against the Plaintiff.

Wherefore, the plaintiff prays that the order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, be reversed, and that said Court be ordered to enter an order and judgment overruling the Respondents' motion to dismiss, and that said Court be further directed and ordered to re-instate said cause and the petition of the plaintiff so dismissed in said Court and in the United States Court for the Eastern District of Oklahoma."

GEO. T. BROWN.

C. P. CHENAULT,

Attorneys for Plaintiff.

ARGUMENT

From the above and foregoing, it is apparent, that there are involved in this appeal, the following questions of law, to-wit:

First.

Did the Secretary of the Interior have authority to approve—after the death of Jennie Samuels and after her allotment had descended to her heirs free from restrictions against alienation—the proposed oil and gas mining lease, executed by her during her lifetime?

Second.

Was the filing of the Departmental oil and gas mining lease with the Superintendent for the Five Civilized Tribes, under date of January 5, 1915, for the purpose of approval or rejection, constructive notice to the purchaser of the oil and gas mining lease from the heirs of said decedent after the death of the allottee; and as a corollary thereto?

Third.

Even had the Secretary of the Interior such power to approve said lease after the death of the allottee, is the Appellant an innocent purchaser, for value, without notice thereof?

First Proposition.

From an examination of the terms of said Departmental oil and gas mining lease as shown in full at pages 53-59 both inclusive, of the transcript of record, it appears that the lease provides in express terms as follows, to-wit:

1. That it shall extend "*for the term of ten years from the date of the approval hereof by the Secretary of the Interior * * **".
2. "Before this lease shall be in force and effect, the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior * * *".
3. "IN THE EVENT RESTRICTIONS ON ALIENATION SHALL BE REMOVED FROM ALL THE LEASEHOLD PREMISES, THIS LEASE SHALL



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BE RELEASED FROM THE SUPERVISION OF THE SECRETARY OF THE INTERIOR, SUCH RELEASE TO TAKE EFFECT WITHOUT FURTHER AGREEMENT FROM THE DATE SUCH RESTRICTIONS ARE REMOVED, AND THEREUPON THE AUTHORITY AND POWER DELEGATED TO THE SECRETARY OF THE INTERIOR, AS HEREIN PROVIDED, SHALL CEASE * * *".

The allottee, Jennie Samuels, died intestate, seized and possessed of the lands in controversy, on the 11th day of October, A. D., 1915, leaving surviving her as her heirs at law, two full-blood Creek Indian citizens, to-wit: Fenev Rogers and Lina White. These heirs under the respective dates of December 6, 1915, and December 27, 1915, executed the oil and gas leases under which the plaintiff claims, and both of which said leases were duly approved by the County Court having jurisdiction of the estate of said decedent, in accordance with the provisions of the Act of Congress of May 27, 1908. Prior to which said dates, and to-wit, on October 21, 1915, WHICH WAS AFTER THE DEATH OF SAID ALLOTTEE, the Department of the Interior attempted to approve the oil and gas lease executed by said allottee during her lifetime, as aforesaid. Thereafterwards, to-wit, under date of August 10, 1916, this lease was filed for record in the office of the County Clerk of Tulsa County, Oklahoma. The leases under which plaintiff claims were filed for record prior to said August 10, 1916.

It is of course admitted, that the Secretary of Interior acting through the United States Indian Superintendent for the Five Civilized Tribes, has jurisdiction and control over the leasing of restricted Indian lands for oil and gas mining purposes. The point which we earnestly contend for is, however, that the Secretary of the Interior has absolutely no supervision or jurisdiction whatsoever over inherited Indian

lands, since the taking effect of the Act of May 27, 1908, Sec. 9 of that act provides as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

(35 Stat. L. 312).

The language of this act operates to divest the Department of the Interior of all jurisdiction over inherited full-blood Indian lands, and in effect, provides that the proper County Court of the State of Oklahoma, must approve or disapprove oil and gas leases covering such lands inherited by such heirs who are full-bloods. As to all other heirs no approval is necessary. While it is true that the several County Courts for this purpose, may be deemed to be Federal Agencies, yet they are distinct and separate arms of such agency, as distinguished from that of the Secretary of the Interior. Therefore, even should it be held that the lease executed by Jennie Samuels be subject to approval by a Federal Agency, after her death, it must certainly follow that such approval under the express terms of the above Act of Congress must be that of the County Court having jurisdiction of said decedent's estate, and not by the Secretary of the Interior. Suppose the heirs were mixed-bloods, could it then be said that the Department would have any jurisdiction after the death of the allottee?

In this connection, it is a well known fact that it is a common practice for conveyances of inherited full-blood Indian lands made prior to the Act of May 27, 1908, which were by virtue of the Act of April 26, 1906, required to be approved by the Secretary of the Interior, but not in fact acted upon by the Secretary prior to July 27, 1908, to be approved thereafterwards by the proper County Court. In

other words, the approving power for all instruments, executed by full-blood Indian heirs, no matter what the date thereof, was the proper County Court, after the Act of May 27, 1908, became effective. This reasoning applies with equal force where the instrument in question is to be asserted against the heirs, although in fact signed by the ancestor. *Particularly is this true where the instrument by its terms provides that it shall not become effective until such approval.* In such a case, the instrument in question is deemed to bear date as of such approval. The Supreme Court of the State of Oklahoma has even held that in such a case, if the County Court should approve a deed prior to the approval of one executed by the same heir by the Secretary of the Interior, the former instrument would take precedence over the latter.

Moffet v. Conley, infra.

The general rule is that the date of an instrument is not the arbitrary date set forth in the instrument itself., but the day and date on which it is to become effective. Cyc., in defining the word date, says:

"In letters, the time when they are written or sent; in deeds, contracts and wills and other papers, the time of execution and usually the time from which they are to take effect and operate on the rights of persons."

13 Cyc., p. 259.

"The real date of a deed is the time of its delivery."
Devlin on Real Estate, Third Ed. Vol. 1 Sec. 177.

And again the same authority says at Sec. 178:

"As a general principle, a deed does not take effect from its date, but from its delivery; but the presumption is, it was delivered on the day of its date, and the date may be contradicted as not essential. It is always competent to show that the date inserted in the deed was not the date of its delivery."

Now, in the case at bar, it is specifically provided in the

instrument in question that it shall not become effective until some day subsequent to the date of its execution, to-wit, on the day it is approved by the Secretary of the Interior. Prior to that approval, however, the proposed lessor died, and the lands in question descended to her heirs, free from all restrictions against alienation, and the Secretary of the Interior thereupon lost his jurisdiction not only by virtue of the terms of the Act of Congress of May 27, 1908, as aforesaid, but also *by express stipulation in the instrument to that effect.*

The United States District Court for the Eastern District of Oklahoma has held, in construing the Act of Congress of May 27, 1908, that the terms of that Act applied as of the date of any given instrument.

Harris v. Gale, 188 Fed. 712.

The Supreme Court of Oklahoma has likewise placed the same construction upon said Act.

MaHarry v. Eatman, 29 Okla. 46, 116 Pac., p. 935;

McCosar v. Chapman, 157 Pac. p. 1059 (Okla.);

Nicholas v. Cornelius, 152 Pac. p. 831 (Okla.);

Sampson v. Staples, 149 Pac. p. 1094 (Okla.).

We think that aside from the express stipulation in the lease providing that the authority of the Secretary of the Interior shall cease upon the removal of restrictions of said lands, it necessarily follows from the above authorities that the approving agency of the lease in question was not the Secretary of the Interior, but the proper County Court.

The Supreme Court of the State of Oklahoma has held in a late case that the general terms and provisions of a given Act of Congress, supersede the effect of a special order of the Secretary of the Interior made pursuant to legislative authority. In that case, the Secretary of the Interior made an order removing the restrictions from certain Indian

lands, which order provided by its terms that it should not become effective until thirty days after its date. The order in question was made April 21, 1906, and had not therefore taken effect on April 26, 1906, and the Act of Congress of that date extending restrictions upon the alienation of full-blood Indians for twenty-five years suspended the order of the Secretary of the Interior and such order was indefinitely postponed and therefore, never took effect.

Deere v. Neumeyre, (Okla.) 154 Pac. p. 350.

Following out the same line of reasoning, it is apparent that the purported order of the Secretary of the Interior approving the lease of Jennie Samuels was of no effect because by the terms of the instrument and of the Act of May 27, 1908, his authority to act in the premises was superseded upon the death of the allottee.

It is also of interest to note that by the terms of section 2 of said Act of May 27, 1908, it is specifically therein provided that the Secretary of the Interior shall have power to approve oil and gas mining leases covering RESTRICTED LANDS ONLY. The language of that section with reference thereto is as follows:

“That leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior * * *”.

The lands in question were not “RESTRICTED LANDS” within the purview of this Act. In the case of *Harris, et al., v. Bell et al.*, not yet officially reported, but which may be found in Vol. 13, No. 20 of the Oklahoma Appellate Court Reporter, at page 383 thereof, this Court held that “Restricted Lands” does not include or affect inherited lands. In construing Section 6, of the Act of 1908, the following language is used:

“Section 6 of the Act of 1908 subjects the persons and property of minor allottees to the jurisdiction of

the probate courts of the state, and in a proviso says, 'no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.' One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed is that it was in violation of this proviso. But in our opinion the proviso does not include or affect inherited lands. It refers, as a survey of the act shows, to lands of living minor allottees and not to lands inherited from deceased allottees. Section 9 expressly recognizes that the latter may be sold, and this proviso cannot be taken as prescribing the contrary. The word 'living' evidently is intended to mark the distinction. What is intended is to make sure that minor allottees receive the benefit of the restrictions prescribed in Section 1, and not to impose others. Apparently it was apprehended that the general language of Section 6 might be taken as enabling probate courts and guardians to sell without regard to those restrictions, and the office of the proviso is to prevent this. So understood, it is in accord with the general scheme of the act and not in conflict with any other provision."

How can it then be said that in the power conveyed by Section 2, supra, the Secretary of the Interior could approve the lease in question, when Section 9 of the same act placed that power with the County Court?

It is apparent that this Act of Congress is intended to supplant and supersede all previous congressional legislation relating to the same subject, and is also intended as a general law designating just what are and what are not restricted Indian lands, and defining the respective powers under which the several County Courts of the State of Oklahoma and the Secretary of the Interior are to perform their respective duties.

We believe, therefore, that when Jennie Samuels died, the lease in question not having then become effective, the lands immediately descended to her heirs unburdened by said proposed lease, and that the subsequent approval there-

of by the Department of the Interior, without jurisdiction so to do, was an absolute nullity.

The circumstances are analogous to a case where there were negotiations for a contract between two parties, by the terms of which contract, it was therein provided that the same should not take effect until approval by a certain designated individual, and before such approval, one party to the contract dies and the subject matter of the contract descends to his heirs. Under such circumstances, it would not for a moment be contended that the party designated to approve such contract could thereafterwards proceed to approve same and make it effective between the one party and the heirs of the other party, who had no notice thereof, nor took any part therein.

The United States cases cited by appellees in the court below in support of said motion to dismiss, to-wit, *Pickering v. Lomax* and *Lykins v. McGrath*, are not in point. In both of these cases the same Governmental Agency was authorized to approve the particular deed in question, after the death of the grantor as before the death. In the case at bar, such is not the case. The approving agency was changed from the Secretary of the Interior to the County Court. Furthermore, both of these cases were where deeds had been executed, acknowledged and delivered to the grantee and in each case the court specifically found that the Indian had received his consideration. There remained but the ratification and approval of the deed by the governmental official. In the case of leasing restricted Indian lands for oil and gas mining purposes, there is no lease until the same is approved by the Secretary of the Interior, and the proposed lessee complies with certain regulations and rules of the Department concerning same. In fact, the bonus money, if any, is deposited in escrow. Moreover, as above mentioned, by express terms, the instrument provides that it shall not be in effect until approved by the Secretary of the Interior.

Therefore, the parties to the proposed lease were not in the same relation to each other as in the case of a deed from an Indian which would require the approval of the President before it became valid. The approval in the case of a lease does not relate back to the date inserted in the instrument, as in the case of a deed, *but the lease by express terms commences with the date of that approval.*

In the leading case upon which all the others are based, to-wit: *Pickering v. Lomax*, where the doctrine of principal and agent is applied, the court say:

“So far as the main question is concerned, we know no reason why the analogy of the law of principal and agent is not applicable here, viz., that an act in excess of an agent’s authority, when performed, becomes binding upon the principal, if subsequently ratified by him. The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Doe v. Beardsley*, 2 McLean 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Marmon v. Partier*, 1p Sm. & Marsh, 425, 427, ‘a condition precedent to a perfect title’ in the grantee; but the neglect in this case to obtain the approval of the President for thirteen years, only shows that or that length of time, the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee, the day after the deed was delivered, sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.”

Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716.

In *Almeda Oil Company v. Kelley*, the doctrine of relation as applied by the court was expressly restricted TO THE PARTIES TO THE CONTRACT. In that case, the

Indian was still living and the only ground upon which he sought to defeat the lease in question was that since the making thereof and the filing of same with the Indian agent, the Indian whose restrictions had been removed in the meantime had "changed his mind." In this connection the court say:

"It occurs to us that if the removal of restrictions on the allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete, to be annulled only on or for some of the grounds under which equity gives relief."

Almeda Oil Company v. Kelley, 35 Okla. 525, 130 Pac. 931.

There might be some merit in the contention of appellees if the instrument in question was completely executed and if the Secretary of the Interior still remained the approving agency after the Act of May 27, 1908, as before that act. Such was the case in both of the United States cases above, to-wit: *Pickering v. Lomax* and *Lykins v. McGrath*. Now when the Department of Interior undertook to act on the lease of Jennie Samuels, *the only power or authority authorized by the Act of Congress to approve any conveyance of any interest in said land was the County Court having jurisdiction of the estate of said decedent*. This court will take judicial notice of the fact that it is the established practice and custom of the Department of the Interior to release all jurisdiction of Indian lands covered by Department leases, just as soon as said lands have by operation of law become unrestricted lands. In fact the lease so provides, and we verily believe that had the attention of the Secretary been called to the fact of the death of the allottee, before his approval of said lease, he would have declined further jurisdiction in the premises.

We therefore most respectfully submit that the attempted and purported approval of the lease in question by the Department of the Interior after the death of said allot-

tee, Jennie Samuels, and after the lands had descended to her heirs, free from all restrictions, was without jurisdiction and had no effect whatsoever upon the instrument in question, and that, therefore, said lease never having become effective during the lifetime of the proposed lessor, is an absolute nullity.

If we be correct in our contentions on this point, then of course, it is unnecessary for the Court to pass upon Proposition No. Two.

As to Propositions Nos. Two and Three

It appears from the facts as above set forth, that the appellant and its assignors acquired its leases from the heirs of the decedent, for value, without actual notice of the existence of the alleged Departmental oil and gas mining lease executed by Jennie Samuels, and that the latter was not filed for record in the office of the county clerk until after appellant's interest had been so acquired and its leases filed. Therefore, under the law as announced in *Pickering v. Lomar*, *supra*, and followed by the Supreme Court of Oklahoma, in *Moffet v. Conley*, *infra*, if the appellant can be said to be an innocent purchaser for value without notice of the existence of said alleged Departmental lease, even though it be held to be valid, as between the parties, it is a nullity as against said appellant. Appellees rely upon a section of an Indian appropriation Act of March 1, 1907, providing:

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, at Muskogee, shall be deemed constructive notice."

(34 Stat. L. 1015).

The decision of the Supreme Court of the State of Oklahoma, followed with approval by the Court below, in its memorandum decision, was so decided by the Supreme Court of the State on rehearing. Prior to which, however, that

same Court had, under date of January 2, 1917, rendered a decision in the same case holding that by reason of the intervention of Statehood, said Act of March 1, 1907, *supra*, was superseded and was not in effect since the formation of the State of Oklahoma. The language of the Supreme Court upon this point in the first opinion is as follows:

“This brings us to the question of law involved, in the main, the question whether the filing of the lease in the office of the Indian agent, imparted constructive notice to the world. The trial court held, and we think correctly, that it did not. Counsel for plaintiff in error contends that the court erred therein, in that the Act of March 1, 1907, (34 Stat. 1026) which provides that ‘the filing heretofore, or hereafter, of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice,’ was not repealed nor abrogated by section 21 of the Enabling Act, which follows:

“‘And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union, shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force within said state as elsewhere within the United States.’

“And section 2 of the schedule of our state constitution, which was adopted and became effective November 16, 1907, which section reads as follows:

“‘All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which were not repugnant to the constitution, and which were not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations, or are altered or repealed by law.’

“It is plain that these sections of the Enabling Act, and the constitution of the state, put in force all laws of the territory not repugnant to nor locally in conflict therewith; bearing in mind these sections, our attention is called to section 1154, Rev. Laws 1910, which was in

force in Oklahoma Territory at that time, which reads as follows:

“ * * * no deed, mortgage, contract, bond, lease nor other instrument relative to real estate * * * shall be valid as against third persons unless acknowledged and recorded as herein provided.”

“It cannot be said that this provision of the statute in reference to filing the recording conveyances, is repugnant to the constitution, nor locally inapplicable to matters under construction here. Section 1155, Rev. Laws 1910, provides for constructive notice, and states clearly what shall be constructive notice. The section is as follows:

“ ‘Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law, from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.’ ”

“This section was also in force at the times herein mentioned. There seems to be no exception to the full application of these statutes, and, therefore they must be applicable to Indian lands, the same as all other lands of the state—especially must this be true as to the Indian lands from which all restrictions have been removed, as is the case with the land involved here. By the Enabling Act and constitution of this state, Albert Cooper and his brothers were made citizens of the state and of the United States, and they held this land free from any and all restrictions against alienation, the same as any other citizen of the state. They sold the land to defendant in error for a valuable consideration. He was a bona fide purchaser without notice of claims of the plaintiffs in error, and is entitled to the relief prayed for, so far as it relates to the cancellation of the lease and quieting of the title. In a recent case, *Moffet et al v. Conley, Admx.*, being No. 5825, not yet officially reported, 163 Pac. 118, the fifth and sixth syllabi are as follows:

“ ‘5. A conveyance by an adult full-blood Indian heir, of inherited allotted lands, made August 9, 1907, was as to a portion of the lands attempted to be con-

veyed, approved by the Secretary of the Interior April 13, 1911, pursuant to the Act of April 26, 1906. On September 25, 1908, said heir sold and conveyed said land to a third party, and on October 6, 1908, said sale and conveyance was approved by the County Court having jurisdiction of the settlement of the estate of the deceased ancestor, as provided in section 9 of the Act of May 27, 1908, (35 Stat. at L. 312 ch. 199). *Held*: That the rights of the second purchaser having intervened, and the first deed being without force until approved, the subsequent approval thereof was without effect upon the title of the grantee in the second deed.

“ ‘6. The conveyance through which the intervenor claimed an equitable title to lands as against both the grantee named in the deeds, and his subsequent grantee, not being approved by the Secretary of the Interior except as to a part of the lands, and that after the rights of said intervenor, being dependent thereon, must fall with the legal title.’ ”

While we realize that the above quoted language is not the law of that case by reason of it having been withdrawn on rehearing, yet we are of the humble opinion that this first decision is more logical and reasonable and is better law than that rendered in the same case on rehearing, and we are setting out as an appendix hereto, the first decision in full. Moreover many of the Constitutional and Statutory provisions of the State of Oklahoma, relied upon by us, are also therein quoted in full.

The case of *Moffet v. Conley*, cited in the *O'Hern* case, was an opinion rendered by Mr. Justice Sharp of the Supreme Court of the State of Oklahoma, and in which the facts were as follows: One Jennie Hickory, a full-blood Creek heir of her intestate, in August, 1907, conveyed said lands to one Skinner, which conveyance was approved by the Secretary of the Interior in April, 1911. In the meantime, to-wit, in September, 1908, she executed another deed, conveying the same lands to one Lewis, which latter deed was in October, 1908, approved by the County Court of the

county having jurisdiction of the estate of said decedent, pursuant to the Act of Congress of May 27, 1908. In this connection, it must be borne in mind that at the time of the execution of her deed to Skinner, the County Court had no authority to approve the deed. In fact, at that time, there was no County Court. Judge Sharp after finding that the Secretary of the Interior had power to approve the Skinner deed, holds, however, that the execution of the Lewis deed and the approval of it by the County Court in the interval between the execution of the Skinner deed and the approval thereof by the Secretary of the Interior, operated to render the second deed valid. In the opinion he says:

“It will not do to say that the approval of the Secretary of the Interior of the former deed to Skinner, long subsequent to the conveyance to Lewis, defeats the latter's title. Until approved, the Skinner deed was without legal effect, and prior to the date of its approval, the rights of Lewis intervened.”

Moffet v. Conley, 163 Pac. p. 118.

Counsel for appellees have referred to the recent case of *Orphans Home v. McClendon*, for authority to the effect that the Acts of Congress supplant the laws of Oklahoma in relations to Indians; that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes. The syllabus of this case upon this point is as follows:

“Our statute on champerty does not apply to restricted Indian lands. Congress has reserved the conclusive right to control the sales, and prescribe the conditions under which title to these lands may pass. And conveyance of such lands made in compliance with the Acts of Congress, and the rules and regulations of the Department of the Interior, carries title to such lands, as against the world.”

We have no quarrel whatsoever with this statement of the law. Every lawyer who is in the least acquainted with

the decisions of the courts in this jurisdiction will readily admit that certain general laws of a general nature and character do not apply to restricted Indian lands. It is readily admitted that under the terms and provision of the Enabling Act, pursuant to which the Constitution of Oklahoma was formed, the power of the Congress of the United States to legislate as to the Indian wards and their property was expressly reserved. No citation of authority, other than the plain and unambiguous language of these two documents, is necessary to establish this proposition. Section 1 of the Enabling Act provides:

"That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or limit or effect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

34 Stat. L. 267, (Bunn's Ed. Secs. 502, 503).

Sec. 3, Art. 1, of Constitution of Oklahoma, provides:

"And all laws in force in the Territory of Oklahoma at the time of admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

34 Stat. L. 277, (Bunn's Ed. Sec. 538.)

Neither is the question of the power and effect of the several Federal Acts for registration of land titles involved herein. Answering this same objection, the United States

Circuit Court of Appeals for the Eighth Circuit in the oft cited and quoted case of *Shulthis v. McDougal* say:

"This is not a case in which the title to the land is in the Government and a proceeding is pending before the Land Department for its acquisition under public land laws. The title to the land was in Berryhill and the object of the supervisory approval of the Secretary of the Interior was simply to protect the Indian against the improvement disposition of his property."

Shulthis v. McDougal, 170 Fed. 529.

It will be remembered that *Shulthis v. McDougal* was decided prior to the enactment by Congress of the Act of March 1, 1907, *supra*, and that the question therein involved was whether or not such a lease was subject to the registration laws then in force in the Indian Territory, and that the question was there answered in the affirmative. Therefore, the only thing now to determine upon this phase of the case is, whether or not the Act of Congress of March 1, 1907, was or was not supplanted and superseded by the terms and provisions of the Enabling Act and the Constitution of the State of Oklahoma. That inquiry being answered in the affirmative, it will follow as a matter of course that the lease in the case at bar must have been filed in the office of the county clerk of Tulsa County, Oklahoma, in accordance with the registration laws of the State of Oklahoma, in order to constitute constructive notice.

Shulthis v. McDougal, supra;

Section 1154-1155, Rev. Laws 1910 (quoted in appendix.)

It must also be kept in mind at the time of the enactment of the Act of March 1, 1907, the Indian Territory was then an unorganized territory and directly subject to the legislative enactments of the general Congress of the United States, and pursuant to which, this piece of legisla-

tion was enacted. Subsequently, however, by the terms and provisions of the Enabling Act and the Constitution of the State of Oklahoma, made in pursuance thereof, all of which became effective November 16, 1907, this same legislative body, to-wit, the Congress, chose to provide that the laws governing registration of instruments, such as the one herein under discussion, should be that of the Territory of Oklahoma, now section 1154 and 1155, Revised Laws 1910, It is not a question of repeal by implication, but by a special legislative enactment of Congress, the language being:

“And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States.”

(34 Stat. L. 277).

It is clear throughout the Enabling Act that it is contemplated that upon the formation of the State of Oklahoma into the sisterhood of states, the laws governing the rights, government, duties and obligations of the citizens of the new state as to their persons and property, should be clearly defined in detail, and it is equally apparent that up to that point all former legislation on the part of Congress as to the people living in this Indian country had been more or less temporary, and that the legislation incident to statehood was intended to be complete and of a general character, thereby superseding, by express provision, all previous Acts of Congress on the same subjects covered by the Enabling Act. It is specifically provided in the Enabling Act how the delegates to the Constitutional Convention should be elected, and the Constitution enacted pursuant to the Enabling Act provides in detail the various state and county officers, and their respective duties. The Enabling Act limits

and defines to a certain extent what provisions may or may not be incorporated in the state constitution, and in a general way outlines a form of government to be provided for, leaving to the Constitutional Convention the formation of the Constitution. Section 21 provides for a full complement of state officers, and concludes with the provision that upon the formation of the state "all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union, shall be in force throughout the state except as modified or changed by this act, or by the constitution of the state, and the laws of the United States not locally inapplicable, shall have the same force and effect within said state as elsewhere within the United States." The state constitution further provides:

"That laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted."

Sec. 59, Art. 5 (Bunn's Ed., Sec. 132.)

And also:

"All laws in force in the Territory of Oklahoma at the time of admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation, or are altered or repealed by law."

Sec. 2, Schedule (Bunn's Ed., 451.)

The constitution enumerates certain specific Acts of Congress in force in the Indian Territory prior to statehood, which might be said to be local and special in their character, and provides for their continuance in effect in the state.

"The Act of Congress entitled 'An Act for the protection of the lives of miners in the territories,' approved March 3, 1891, and the Act of Congress entitled 'An Act to amend an act entitled 'An Act for the pro-

tection of the lives of miners in the territories,' approved July 1, 1902, are hereby extended to and over the State of Oklahoma until otherwise provided by law: *Provided*, That the words, governor of the state, are hereby substituted for the words, 'governor of such organized territory,' and for the words 'Secretary of Interior,' wherever the same appear in said acts, and the words, 'Chief Mine Inspector,' for the words 'Mine Inspector,' wherever the same appear in said acts. The Chief mine inspector shall also perform the duties required by laws of the Territory of Oklahoma of the territorial oil inspector until otherwise provided by law."

Sec. 13, Schedule (Bunn's Ed., 462.)

If it had been intended to continue in effect the local and special Act of March 1, 1907, *supra*, it would have been easy enough to have included that act with the others enumerated in said section 13, of the schedule.

Finally, the constitution and the ordinance irrevocably accept the terms of the Enabling Act.

Section 28, Schedule (Bunn's Ed., 477 and 497).

In the light of these constitutional provisions there is no doubt but that the authority of Congress still exists with reference to the Indians and their property, in so far as the same or any part thereof may be subject to restrictions from alienation. It is not believed, however, that this reservation in the Enabling Act would confer upon Congress the authority to legislate as to any former member of the Five Civilized Tribes who is made a citizen of the State of Oklahoma, and who holds his lands free from any restriction against alienation. Furthermore, the matter of providing a system of registration or recording acts is peculiarly the exercise of a state sovereignty, and could not in any sense be said to be legislation affecting an Indian or his property. Whether this Act of March 1, 1907, *supra*, was or was not constitutional prior to statehood, is a debatable question, but

one not in issue at this time. All that we are now concerned with is the status of this act since the formation of the State of Oklahoma.

There is nothing in the Enabling Act, constitution or the registration laws of the State of Oklahoma adopted thereby, excepting from the full force and effect of said registration laws all instruments therein contemplated, no matter by whom executed.

The language of section 21 of the Enabling Act is unequivocal. There are only two exceptions to the applicability of the Oklahoma Territory laws. One where modified or changed by the Enabling Act; and the other where modified or changed by the constitution. Neither the constitution nor the Enabling Act made any provision for continuing any registration law in effect in Oklahoma other than the registration laws of the Territory of Oklahoma.

Bledsoe's Indian Land Laws, 2nd Ed., Sec. 233.

It is not then a question of repeal by implication, for the language of the Enabling Act specifically provides that all laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, not repugnant to the constitution, and not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma.

Now among the laws extended in the State of Oklahoma by virtue of the above and foregoing provision, were sections 1154 and 1155, Revised Laws of 1910, providing what instruments should be recorded in the office of the register of deeds in order to constitute constructive notice, and in which is included an oil and gas mining lease, no matter by whom that instrument be executed. How can it be said that these recording statutes do not apply to instruments executed by Indian citizens of the state? Furthermore, it is perfectly apparent that the Congress of the United States

has recognized the fact that the recording laws of Oklahoma applied to Departmental leases, for when the Act of May 27, 1908, *supra*, was enacted, by section 3 thereof, it is provided as follows:

"That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed, under or by authority of any Act of Congress, shall have power to cancel and annul any oil, gas mining lease on said lands whenever the owner or owners of said lands, and the owner or owners of the lease thereon agree in writing to terminate said lease, and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, AND THE SAME SHALL BE RECORDED IN THE COUNTY WHERE THE LAND IS SITUATED."

Why this provision for recording a release of a Departmental lease in the county where the lands are situate, unless it was contemplated by Congress that the oil and gas lease to be cancelled should likewise have been recorded in said office?

The case of *Anicker v. Gunsburg*, 226 Fed. page 176, was not a case decisive of, or even involving the question here raised. In that case, an Indian owner of restricted lands had given a lease thereon to two parties, both of whom had filed same with the Indian Agent. One lease was approved and the other disapproved, and this Court there held that the discretion of the Secretary of the Interior in his ruling upon said leases was not abused. No question whatsoever was raised as to whether or not the Act of March 1, 1907, *supra*, was still in effect, both parties apparently relying on same and treating said act as still in force and effect.

Neither does the doctrine of *lis pendens* apply, and we do not deem it necessary to enter into a discussion thereof, further than to quote from *Shulthis v. McDougal*, at page 337 thereof:

“This decision in our judgment controls the question we are now considering, and under it the lease was subject to the registration law in force in the territory, and should have been recorded in order to protect the interest which it granted as against a good faith purchaser.”

Shulthis v. McDougal, 170 Fed. 529.

CONCLUSION

Therefore, it follows from the above and foregoing, that even if this Court should hold that the Act of March 1, 1907, *supra*, is still in full force and effect, yet the Court must further find that the Secretary of the Interior had power to approve the lease in question after the death of the allottee and the descent of her estate, free from restrictions, to her heirs. If the Court should decided either of these question in favor of the Appellant, then the judgment of the Court below should be revised.

All of which is respectfully submitted,

JOHN DEVEREUX,
Counsel for Appellant.

APPENDIX
APPENDIX

Scioto Oil Co., et al v. O'Hern.

(Supreme Court Commission, Division Number Six
Jan. 2, 1917.)

(Time for filing petition for rehearing expires Jan. 17, 1917),

7055—The Scioto Oil Company, a corporation, and John
M. Ingram v. P. S. O'Hern.

SYLLABUS

1. RECORDS—SECTION 1154, R. L. 1910, APPLIES TO CITIZENS OF CREEK NATION. Section 1154, Rev. Stat. 1910, Ann., which provides that "no deed, mortgage, contract, bond, lease or other instrument relating to real estate * * * shall be valid as against third persons unless acknowledged and recorded as required by law," was put in force in the State of Oklahoma by Section 21 of the Enabling Act and Section 2 of the Constitution of this State, and is applicable to all duly enrolled citizens of the Creek Nation without regard to quantum of Indian blood, as to the surplus allotted lands of said Nation, and to the same extent and with like effect as is applied to other citizens of the State of Oklahoma and the United States.

2. OIL AND GAS—VALUE OF SAME MAY BE RECOVERED BY OWNER WHERE UNLAWFULLY TAKEN. If oil or gas has been unlawfully and wrongfully taken from the premises of another, the owner has the right to recover the value of the product so wrongfully taken, and the trespasser, or wrong doer, is not entitled to be credited with the expenses of extracting such oil or gas from the ground.

Error from the District Court of Tulsa County, L. M. Poe, Judge.

Action by P. S. O'Hern, as plaintiff, against John M. Ingram and Scioto Oil Company, a corporation, as defend-

ants; judgment for plaintiff, and defendants bring error. Affirmed.

Edw. H. Chandler, John Wheeler, J. P. O'Meara, for plaintiffs in error. Geo. T. Brown, for defendant in error.

ROBERTS, C. The plaintiff relied upon the following state of facts: The land involved is the southeast quarter of section 12, township 16 N., R. 13 E. I. M., Tulsa County, and was allotted by the Creek Nation of Indians to one Albert Cooper, who was a full-blood citizen of that nation, enrolled Number 1953, being his distributive share of the allotted lands of that Nation, and duly patented to him during his lifetime. He died on the 16th day of September, 1912, leaving two sons, Sam and John Cooper, as his only heirs. Thereafter, on the 27th day of September, 1912, Sam Cooper, being a single man, made, executed and delivered a warranty deed to his undivided one-half interest in said land to one W. W. Fox. The deed contained the usual covenants of warranty, and was approved by the county judge of said county on the first day of October, 1912, as provided by Section 9 of the Act of Congress of May 27, 1908, and filed for record in the office of the register of deeds of said county on the 2d day of October, 1912. On the 2d day of December, 1912, John Cooper and wife deeded his undivided half interest in said land to said Fox, which was approved by the county court of said county, on the same day, and filed for record in the office of the register of deeds, on the 3d day of December, 1912. On the 9th day of December, 1912, Fox and wife conveyed said land to P. S. O'Hern, the defendant in error (plaintiff below), and that deed was filed for record in the office of the register of deeds of said county on December 16, 1912. The plaintiffs in error (defendants below) claim right of possession of said premises under a departmental oil and gas lease, which was executed and delivered by Albert Cooper during his lifetime, August 16, 1912, to one John M. Ingram, and which lease was filed in the office of

the Indian agent at Muskogee on August 23, 1912, pursuant to Act of March 1, 1907, and approved by the Department of the Interior on December 24, 1912.

The oil and gas lease was not filed in the office of the register of deeds until May 8, 1913, and W. W. Fox, the immediate grantor of the defendants in error, had no actual knowledge or notice of said lease at the time he purchased the land from Sam and John Cooper, heirs of the original allottee, Albert Cooper. The Scioto Oil Company became the owner of an undivided half interest in this lease on May 14, 1913, by assignment from John M. Ingram, and June 23, 1913, the Interior Department released all supervision over this land.

Upon these issues, the case was tried to the court without a jury. At the conclusion of the trial, the court made findings of fact and conclusions of law, as follows:

1. "That the land in controversy was allotted to Albert Cooper, a full-blood Indian of the Creek Nation or Tribe of Indians.

II. "That on the 15th day of September, 1912, said Albert Cooper died intestate, leaving surviving him Sam Cooper and John Cooper, his brothers.

III. "That prior to the death of the said Albert Cooper, to-wit, on August 16, 1912, he made, executed and delivered to the defendant, John M. Ingram, a departmental oil and gas lease covering the lands in controversy.

IV. "That on August 23, 1912, the said John M. Ingram caused said lease to be filed in the Indian agent's office at Muskogee.

V. "That on September 27, 1912, one of the heirs, Sam Cooper, made, executed and delivered to W. W. Fox a warranty deed covering his interest in and to said premises.

VI. "That said deed was approved October 1, 1912.

VII. "That on November 21, 1912, the said W. W. Fox entered into an executory contract of sale and purchase for the land described in the petition for a consideration of \$3,600.

VIII. "That one thousand dollars of said sum was by the plaintiff on that date paid to the said W. W. Fox.

IX. "That by the terms of said contract the remainder of the consideration was to be paid when Fox perfected the title to the land in controversy and furnished an abstract of same showing the same to be perfected, within sixty days from the date thereof.

X. "That on December 2, 1912, the joint heir, John Cooper, made, executed and delivered to W. W. Fox his warranty deed covering his interest in said land.

XI. "That on the same date the same was approved as required by law.

XII. "That on December 9, 1912, W. W. Fox made, executed and delivered to the plaintiff, P. S. O'Hern, his warranty deed, covering the land in controversy.

XIII. "That on December 24, 1912, the departmental lease to John M. Ingram which had theretofore been executed, to-wit, on August 16, 1912, was by the department of the interior approved.

XIV. "That on May 14, 1913, John M. Ingram duly assigned an undivided one-half interest in said lease to the Seito Oil Company.

XV. "That on June 23, 1913, the department of the interior relinquished supervision over said property.

XVI. "That on December 16, 1912, the plaintiff paid the remainder of the purchase price provided for in the executory contract of sale.

XVII. "That said W. W. Fox purchased the land from

the heirs of Albert Cooper, deceased, without actual knowledge of said oil and gas lease.

XVIII. "That the said plaintiff, P. S. O'Hern, paid the \$1,000 under the executory contract of sale without actual knowledge of said oil and gas lease.

XIX. "That the said P. S. O'Hern, prior to the payment of the remainder of the consideration for said land came into possession of facts which were sufficient to put him upon inquiry as to the outstanding incumbrances against said land.

XX: "That on the 16th day of December, 1912, the plaintiff caused to be written a letter to the Indian agent inquiring as to the legal status of said land.

CONCLUSIONS OF LAW.

I. "The court is of the opinion that the Act of March 1, 1907, providing for the filing of leases in the office of the United States Indian agent, and that the same should be constructive notice to all parties thereafter dealing with the property covered by such lease were superseded by the Constitution and schedule to the Constitution and the laws of Oklahoma Territory extended over and put in force in the State of Oklahoma upon the admission of Oklahoma into the Union of States.

II. "By the said Constitution and the schedule of the same, Oklahoma became an organized sovereign State admitted upon an equal footing with all other States, with the paramount right to legislate for her citizens and the exclusive right to provide what should constitute constructive notice under the recording acts of the State, and that the provision of the Enabling Act which provides that nothing contained in the said Constitution should limit or impair the rights of persons or property pertaining to the Indians of said territories, etc., or to limit or to affect the authority

of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties agreement, law or otherwise which it would have been competent to make if this Act had not been passed, does not interfere with the sovereignty of the State in dealing with the said question of constructive notice, nor are such recording acts in conflict with the provision of the Enabling Act.

III. "Having reached the above conclusion, it follows as a matter of law that W. W. Fox, the plaintiff's grantee, was a bona fide purchaser of the land in controversy and took same without knowledge either actual or constructive of the lease claimed under this action.

IV. "That a purchaser with notice from a purchaser without notice has all the rights of the latter; therefore, it is immaterial as to whether the plaintiff had actual notice of the existence of the lease at the time of the consummation of his purchase, he having purchased from W. W. Fox, who was without notice, either actual or constructive, he took his title free and clear from such incumbrance.

V. "It is immaterial under the conclusion of law reached by the court as to whether the oil and gas lease upon its approval by the Interior Department related back and became effective upon the date of its execution and delivery for the reason that had the same been executed and delivered and approved upon said date and not placed of record at a place required by the laws of Oklahoma and third parties had purchased land in controversy without actual knowledge of said lease, they would have taken the same free and clear of all incumbrances and without constructive notice.

VI. "Where a full-blood allottee of the Creek Nation executes a departmental oil and gas lease upon his allotment and the same is filed with the Indian agent and Department

of the Interior for approval and said allottee dies before the approval of the same by the Secretary of the Interior, leaving two adult heirs surviving him and said land under the law at the time of his death descends free from restrictions upon alienation and his heirs thereafter make, execute and deliver a warranty deed to said land, the party who takes the same without actual or constructive notice of the former lease executed by the allottee prior to his death and before said lease is approved by the Secretary of the Interior, takes title to said land free from the claims of the first lessee.

VII. "Under the above stated facts, the original lease would relate back and the rights of the lessee thereunder would attach on the date of its execution and delivery, subject to the rights of intervening persons who dealt with the subject matter without actual or constructive notice of said lease.

"The case of *Kelly v. Alameda Oil Company*, reported in 130 Pac. 933, and *Pickering v. Lomax*, reported in 36 Law Ed. 716, U. S. Reports, in my opinion support the doctrine that intervening rights of bona fide third parties who acquire interest in Indian land between the date of the sale or lease of the Indian's land and the date of its approval, are protected. In the Kelly case, the court expressly holds, 'That had it not been for the fact that Kelly had notice of the lease made to defendant, that he (Kelly) would not have been bound thereby.' The same doctrine has also been laid down in the Lomax case above referred to.

"I am therefore of the opinion that the plaintiff in this action should recover, and judgment should be rendered as prayed, and it will be so ordered."

It is apparent from the foregoing that the question of fact involved is the bona fides of the grantees, Fox and O'Hern, and thereby the effect of the filing of the oil and

s lease to John M. Ingram, in the office of the Indian agent on the 23rd day of August, 1912, insofar as it relates to the question of constructive notice of said lease.

There is no question as to the priority of the lease, nor to the fact that it was filed in the office of the Indian agent at Muskogee prior to the death of Albert Cooper, and consequently prior to the conveyance from the heirs, Sam and John Cooper, to W. W. Fox. Upon the question of fact, the trial court finds "that W. W. Fox purchased the land from the heirs of Albert Cooper, deceased, without actual knowledge of said oil and gas lease," and P. S. Hern paid \$1,000 under the executory contract of sale (for the purchase of the land), without actual knowledge of said oil and gas lease." The rule that this court are fully and clearly sustained by the trial court when there is any testimony tending to support them, is too well settled to require further attention. We will add, however, that to our mind, the findings of the court are fully and clearly sustained by the evidence, and are approved and adopted here.

"This brings us to the question of law involved, in the main, the question whether the filing of the lease in the office of the Indian agent, imparted constructive notice to the world. The trial court held, and we think correctly, that it did not. Counsel for plaintiff in error contends that the court erred therein, in that the Act of March 1, 1907, (34 Stat. 1026) which provides that 'the filing heretofore, or hereafter, of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice,' was not repealed nor abrogated by Section 21 of the Enabling Act, which is as follows:

" 'And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union, shall be in force throughout said State, except as modified or changed by this act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force within said State as elsewhere within the United States.'

“And Section 2 of the schedule of our State Constitution, which was adopted and became effective November 16, 1907, which section reads as follows:

“ ‘All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which were not repugnant to the Constitution, and which were not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations, or are altered or repealed by law.’

It is plain that these sections of the Enabling Act, and the Constitution of the State, put in force all laws of the Territory not repugnant to nor locally in conflict therewith. Bearing in mind these section, our attention is called to Section 1154, Rev. Laws, 1910, which was in force in Oklahoma Territory at that time, which reads as follows: “ * * * no deed, mortgage, contract, bond, lease nor other instrument relative to real estate * * * shall be valid as against third persons unless acknowledged and recorded as herein provided.’ It cannot be said that this provision of the statute in reference to filing and recording conveyances, is repugnant to the Constitution, nor locally inapplicable to matters under construction here. Section 1155, Rev. Laws, 1910, provides for constructive notice, and states clearly what shall be constructive notice. The section is as follows:

“ ‘Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.’

“This section was also in force at the times herein mentioned. There seems to be no exception to the full application of these statutes, and, therefore, they must be applicable to Indian lands, the same as all other lands of the state,—especially must this be true as to the Indian lands from which all restrictions have been removed, as is the case with the land involved here. By the Enabling Act and Constitution of this State, Albert Cooper and his brothers were made citizens of the State and of the United States, and they held this land free

from any and all restrictions against alienation, the same as any other citizen of the State. They sold the land to defendant in error for a valuable consideration. He was a bona fide purchaser without notice of the claims of the plaintiffs in error, and is entitled to the relief prayed for, so far as it relates to the cancellation of the lease and quieting of the title. In a recent case, *Moffet et al. v. Conley, Admx.*, being No. 5825, not yet officially reported, 163 Pac. 118, the fifth and sixth syllabi are as follows:

“ ‘5. A conveyance by an adult full-blood Indian heir, of inherited allotted lands, made August 9, 1907, was as to a portion of the lands attempted to be conveyed, approved by the Secretary of the Interior April 13, 1911, pursuant to the Act of April 26, 1906. On September 25, 1908, said heir sold and conveyed said land to a third party, and on October 6, 1908, said sale and conveyance was approved by the county court having jurisdiction of the settlement of the estate of the deceased ancestor, as provided in Section 9 of the Act of May 27, 1908, (35 Stat. at L. 312, chfl 199), *Held*: That the rights of the second purchaser having intervened, and the first deed being without force until approved, the subsequent approval thereof was without effect upon the title of the grantee in the second deed.

“ ‘6 The conveyance through which the intervenor claimed an equitable title to lands as against both the grantor named in the deeds, and his subsequent grantee, not being approved by the Secretary of the Interior except as to a part of the lands, and that after the rights of third parties had attached the equitable rights of said intervenor, being dependent thereon must fall with the legal title.’ ”

Although we have not the case before us, the syllabi which we have quoted above seem to be in point here and to sustain the doctrine we here lay down.

We come now to the question as to the amount of recovery for the oil and gas removed from the premises, which plaintiff alleges that defendants appropriated to their own use.

Counsel claims that the court erred in rendering judgment for the full amount of the oil and gas taken from

United States Supreme Court, U. S.

FILED

JAN 12 1921

JAMES D. WAHER,
CLERK.

No. 188.

In the
Supreme Court of the United States.
October Term, 1920.

ANCHOR OIL COMPANY, *Appellant,*
VERSUS
W. H. GRAY, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

A. A. DAVIDSON,
PRESTON C. WEST,
Solicitors for Appellees,
W. H. Gray, F. D. McDonnell,
Charles Egan and F. C. Giddings.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1920.

No. 188.

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BRIEF *on BEHALF of APPELLEES.*

Believing that a statement of the essential facts as they appear in the record, will be of service to the court, we submit the following:

Jennie Samuels was a full-blood Creek Indian, enrolled opposite Roll No. 5941, and as such, the eighty acres involved, described as the East Half ($E\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of section thirty-six (36), township eighteen (18) north, range twelve (12) east, Tulsa County, Oklahoma, were allotted to her, and patent therefor approved October 9, 1903 (Rec., pp. 3-4). The fact that part of the tract involved is homestead and a part surplus is without significance in this case.

Jennie Samuels died October 11, 1915, and left as her heirs, a daughter, Feney Rogers, and a granddaughter, Lina Lowe, to whom the land descended. Both Feney and Lina were full-blood Creek Indians, duly enrolled as such.

The rights of appellees, who are in possession of the premises and operating same for oil and gas, arose as follows:

Prior to her death, and on December 5, 1914, Jennie Samuels, pursuant to the rules and regulations of the Secretary of the Interior, made an oil and gas mining lease covering the lands in controversy. This lease was duly filed in the office of the United States Indian Agent (now designated as Superintendent of the Five Civilized Tribes), Union Agency, at Muskogee, on the 5th day of January, 1915. It was sent forward to the office of the Commissioner of Indian Affairs with favorable recommendation, and in due course by the Indian Commissioner to the Secretary's office, and was approved by the Secretary October 21, 1915. This final approval by the Secretary, it will be noted, was ten days after the death of Jennie Samuels (Rec., p. 58).

This departmental lease was not filed for record in the local recorder's office, upon its approval by the Secretary—it was not in fact filed for record in the County until August 10, 1916 (Rec., p. 59), which was subsequent to the execution and recording on the county records of the leases under which appellant claims, as will presently appear.

Appellees, who, by virtue of mesne assignments, have become the owners of this lease, began active operations on the premises in the spring of 1916, prior to the institution of this suit, and have ever since been engaged in the production of oil therefrom.

The asserted claim of appellant is as follows:

After the death of the original allottee, Jennie Samuels, *and some six weeks after the Secretary of the Interior had approved the departmental oil and gas lease now owned by appellees*, that is to say, on *December 6, 1915*, one of her heirs, Feney Rogers, executed a lease on the entire eighty acres here involved. Feney, and the other heir, Lina Lowe, having agreed upon a division of the tract by which Feney took the north sixty acres thereof, the County Court approved her lease on the day it was executed so far, and so far only, as this north sixty acres of the tract was concerned (Rec., p. 4).

Three weeks later, that is, *December 27, 1915*, Lina Lowe, made an oil and gas lease on the south twenty acres of the tract, which was approved by the County Court January 3, 1915.

These two leases have by mesne assignments become the property of appellant, Anchor Oil Company, and both of said leases and the several assignments thereof were recorded in the county records (office of the county clerk) prior to August 10, 1916, which was the date appellees filed the departmental lease in the local (county clerk's) recording office.

This suit was begun January 18, 1917, some eight months or more after appellees had developed the premises for oil and were engaged in producing the same therefrom. The bill prays a cancellation of the lease of appellees; that they be enjoined from interfering with appellant in the possession of the premises; and for damages for detention of the property. By an amendment, a further allegation was made that complainant, at the time it acquired the assignments of the leases under which it claims, had no information, knowledge or notice of the departmental lease under which appellees claim and the departmental lease was set up as an exhibit and made a part of the bill (Rec., pp. 51-59). By stipulation the motion to dismiss was made to relate to the bill and the amendment as though the two together constituted the original bill (Rec., p. 51).

There was a memorandum decision by the District Court (Rec., pp. 59-60) and pursuant thereto, an order sustaining the motion to dismiss and dismissing the bill (Rec., pp. 60-61). This was affirmed by the Circuit Court of Appeals, 257 Fed. 277.

Assuming the validity of its own leases, complainant's contention has been, and is, that the departmental lease is without validity because the Secretary had no legal right to approve it after the death of the allottee lessor, and at all events, is ineffectual against appellant for want of record. This was their only possible position (and it is said that necessity is the mother of invention), for, upon the facts, it is

at once apparent that appellant, as against appellees, is wholly without right in the premises, and there was no error in the judgment of the trial court, *unless*:

(a) Appellant is, not only itself the owner of a valid oil lease or leases upon the lands involved; but

(b) The lease of appellees is void or against it, either because an invalid instrument, or, as to the complaining company, has become so, by reason of failure of appellees to put it of record in the local recording office.

We shall present the matter to this court in four propositions set out below. In order to justify a reversal all of these propositions must be resolved against appellees. If, however, the court agrees with us as to the soundness of proposition number one and either of two or three, it will not be necessary to consider the fourth at all. In the event this court shall determine we are wrong as to proposition number one (a contingency which the writer of this brief cannot contemplate as at all possible), then the court must pass upon proposition four. For it goes without saying that if the complainant has not a valid lease there is no reason for the court to disturb parties in possession whether or not they are in of right.

First Proposition.

The lease made by Jennie Samuels, the original allottee, during her lifetime, and pending for approval in the Department of the Interior at the time of her death, was rightfully approved by the Secre-

tary, though the act of approving same did not occur until ten days after her death; and is a valid instrument.

Second Proposition.

The Act of Congress approved March 1, 1907, (34 Stat. 1026), which provides, *inter alia*, that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice," was not repealed nor abrogated either by the Act of Congress providing for the admission of the State of Oklahoma into the Union, or by the Constitution of the State of Oklahoma, or by both together, and was in full force and effect at all of the times during which the transactions concerning the lands involved in this case took place.

Third Proposition.

If the Act of March 1, 1907, should be held to have been repealed by the Enabling Act and the admission of the State of Oklahoma into the Union, nevertheless the oil and gas mining lessees of Jennie Samuels under the departmental lease approved by the Secretary of the Interior, are prior in time and prior in right to those claiming under the subsequent leases made by the allottees' heirs after the approval of the former lease.

Fourth Proposition.

The leases under which appellant is asserting its claim and which constitute its only alleged right

in the premises, have never been approved by the Secretary of the Interior, as required by section 2 of the Act of Congress approved May 27, 1908 (35 Stat. 312), and are for that reason not valid instruments and confer no right on appellant.

I.

The lease made by Jennie Samuels, the original allottee, during her lifetime, and pending for approval in the Department of the Interior, at the time of her death, was rightfully approved by the Secretary, though the act of approving same did not occur until ten days after her death; and is a valid instrument.

The soundness of the foregoing proposition seems so entirely settled by adjudged cases as to leave little to be said argumentatively. In fact, not only the trial court in the instant case, but every court, so far as we have been able to ascertain, where the question was involved, has determined it favorably to the position of appellees.

- Lomax v. Pickering*, 173 U. S. 26;
- Lykins v. McGrath*, 184 U. S. 169;
- Scioto Oil Co. v. O'Hern*, (Okla.) 169 Pac. 483;
- Almeda Oil Co. v. Kelly*, 35 Okla. 525, 130 Pac. 931;
- Harris v. Bell*, . . . U. S. . . . (Dec'd Nov. 15, 1920).

In both *Lykins v. McGrath* and *Lomax v. Pickering*, *supra*, this court decided that where a deed was

given by an Indian which depended for its validity upon approval by either the President of the United States or the Secretary of the Interior, such approval could be effectually given by the designated official as well after the death of the Indian grantor as before. The fact that during the pendency of the lease for approval the land descended to the heirs and was thereby freed of the original restrictions seems to us wholly immaterial. The heirs here were full-bloods, so that as we maintain the provision requiring the Secretary's approval still obtained as to them. *But the lease of appellees was made in December, 1914, when the allottee was living.* It was made under the provision of section 2 of the Act of Congress of May 27, 1908 (35 Stat. 312). The Secretary of the Interior was then, and has at all times since been, not only the proper official, but the sole official, having power to approve such leases. That such changes in the situation while leases of this sort were pending in the Department for approval, not only by reason of death, but from the direct operation of law as well, or the acts of the Secretary himself in removing restrictions, must from time to time occur, could not possibly have escaped the attention of the legislators. Had they intended that such change should affect the Secretary's power and authority it would have been so expressed in the statute. Even in judicial proceedings, where technical methods of procedure obtain, if a cause had been submitted to a court, or verdict has been rendered, prior to death of a

party, judgment may be rendered as of a date anterior to the death of the litigant. And the same is true where an appeal is taken from a lower court to a higher. After submission in the appellate tribunal the death of a party will not prevent a reversal or affirmance. Certainly more latitude and liberality should be allowed the Secretary of the Interior in handling these Indian leases.

The heirs could not so deal with the property after the death of allottee, even before the Secretary's approval, as to affect the rights of the Departmental lessees.

In *Lutkins v. McGrath*, *supra*, Mr. Justice BREWER said:

"But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to-wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice."

In the present case, the alleged claim of appellants had its inception long after the final approval by the Secretary of appellee's lease. It has no equities whatever that it can urge to defeat our title. If it has any right superior to the title of appellees,

it must be a legal right pure and simple growing out of the recording laws.

In *Scioto Oil Co. v. O'Hern*, *supra*, the facts were as follows:

"Albert Cooper, a full-blood citizen of the Creek Nation, executed an oil and gas lease on the premises August 16, 1912, to John M. Ingram, which was filed in the office of the United States Indian Agent, Union Agency, at Muskogee, for the purpose of securing the approval of the Secretary of the Interior, which approval was granted December 29, 1912. Before the approval of said lease Cooper died, and his two brothers, being his only heirs, conveyed said lands to one Fox, which conveyances were approved by the County Court, and Fox thereafter conveyed to O'Hern. The lease executed by Cooper to Ingram was assigned to the Scioto Oil Company, who entered into possession of said land for the purpose of extracting oil therefrom. The oil and gas lease was not filed and recorded with the register of deeds of Tulsa County in accordance with the state recording laws, and Fox and O'Hern took title without actual notice of the execution of said lease."

And the Supreme Court of Oklahoma said:

"Neither was said lease invalid because not approved prior to the death of Albert Cooper. At the time the lease was executed the parties thereto were both qualified to enter into it. The consideration was valid, the subject-matter legal, and there was a mutuality of obligation depending merely upon the approval of the Secretary of the Interior. *Almeda Oil Co. v. Kelly*, 35 Okla. 525, 130 Pac. 931; *Brader v. James*, 154 Pac. 560.

“The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that prior to the approval thereof by the Secretary one of the parties had died, and that the Secretary’s power or authority to approve the same had lapsed, because of the death of the allottee operating to remove the restrictions against the alienation thereof under section 9, Act Congress May 27, 1908, c. 199, 35 Stat. 315. This contention cannot be sustained.

“In *Almeda Oil Co. v. Kelly*, *supra*, a lease had been executed and submitted to the Secretary for his approval, and prior to the approval thereof the restrictions of the allottee had been removed, and he thereafter changed his mind and desired to withdraw from said lease, but same was afterward approved by the Secretary. It was contended that because restrictions against the alienation of said land had been removed the Secretary had no right to approve the lease over his protest and objection. This contention, however, was denied, and it was held in accordance with what we have already stated that the contract only needed the approval of the Secretary to be valid in every particular, and that the approval of the Secretary related back to its execution and rendered it valid from that time, and it was further held that, if the removal of restrictions upon the allottee’s complete right to lease would have any effect whatever, it would be to render the contract of the parties complete to be annulled only on or for some of the grounds under which equity gives relief.

“In *Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. ed. 716, the Supreme Court of the United States held, where a deed had been

executed under the Treaty of Prairie Du Chien, which provided that the lands should never be leased or conveyed to any person whatever without the permission of the President of the United States, that the neglect to obtain the approval of the President for thirteen years after the execution of the deed only showed that for that length of time the title was imperfect, and that the approval of the President after the expiration of that time operated upon the deed precisely as if the authority to execute the same had been previously given, inasmuch as the rights of no third parties had intervened between the date of the deed and the approval thereof, and this was true though the grantee of said deed had died previous to the approval thereof; and the rights intended to be conveyed to the grantee inured to his heirs, not as a new title acquired by the warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed imperfect when executed may be made perfect as of the date of its delivery.

"In *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. ed. 485, it was held that the consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and, when so given, is retroactive in its effect, and relates back to the date of the conveyance so as to cut off any claim of the heirs of such grantors to the land. In all of these cases it appears that no equities had been acquired superior to those of the grantee in the lease or deed involved. In the present case no such rights could be acquired because of the Act of March 1, 1907, which made the filing of such

lease in the office of the Union Agency constructive notice of the execution thereof, and the rights intended to be conveyed thereby. The purpose of requiring the lease to be approved by the Secretary was to see that the allottee should not be wronged in any lease he might desire to make, and that the lease be subject to no unreasonable qualifications. It was not to prevent the leasing of the premises but to guard against imposition therein, and when the Secretary approved the lease, it was a determination that the purposes for which the restriction was imposed had been fully satisfied, that the consideration was ample and that there were no unreasonable stipulations contained in the contract. When this was accomplished, justice requires that the lease should be upheld, and to that end the doctrine of relation attaches to the approval of the lease and makes it operative as of the date of the execution thereof. The situation is very much like that where a deed had been fully executed and placed in escrow to be finally delivered on performance of a condition, and the brothers and their grantees who took with the notice imparted, under the Act of March 1, 1907, by the filing of the lease in the office of the Indian Agent, Union Agency, Muskogee, acquired no equities superior to those of the lessee and his assignee. The brothers were heirs of the allottee, and took all of the title which he had at his death but when the Secretary approved the lease, their claims as heirs cannot be compared with those of the lessee, in equity. They are not in the attitude of *bona fide* purchasers, and the doctrine of relation intervenes, and makes the approval by the Secretary retroactive and effective as of the date of the lease, and, as the brothers and their grantee

have no equitable rights superior to those of the lessee, it follows that the lease must be upheld."

On page seven, *et seq.*, of appellant's brief, it is insisted that the lease could not be approved by the Secretary of the Interior after her death, because of its provisions (a) *that it should extend for the term of ten years from the date of approval by the Secretary*; (b) *that before the lease should be in force and effect lessee should furnish bond with responsible surety satisfactory to the Secretary*; and (c) *in the event restrictions on alienation should be removed, supervision of the Secretary should cease.*

Now, so far as the *term* is concerned, that merely marks the limit of time during which the lessee was to actually enjoy the rights and privileges conferred. It in no manner has anything to do with the question of the validity of the lease, or the date of its execution, or the inception of rights under it. Parties may fully execute a lease in the fall which is not to take effect in possession and enjoyment until spring.

—*Johnson v. Carson, Etc. Co.*, 157 Fed. 145;
McCroy v. Tony, (Miss.) 2 L. R. A. 847;
Whitney v. Ohlert, (Mich.) 50 Am. R. 265;
Brown v. Kayser, (Iowa) 18 N. W. 527.

The provision for the giving of bond before lessee's rights would be so far complete that he would be permitted to extract the oil and strip the land of its mineral content, usually its most valuable part, was a purely administrative matter for the protection of the government's ward. Upon the making and

approval of the lease the holder thereof had the absolute right to make the bond, and upon compliance with this requirement, enjoy all the benefits flowing from his contract. In principle this is no different from the doctrine announced in the cases last above cited.

In like manner, the provision with regard to supervision by the Secretary was inserted in all departmental leases to provide for future contingencies that were bound to happen in some cases, and could very well happen in any case. Had the lease here been approved by the Secretary immediately upon its execution by Jennie Samuels, it would have remained under the administrative supervision of the Secretary until her death, or some future act of Congress, or the action of the Secretary himself (as in *Almeda Oil Co. v. Kelly*) removed restrictions from the land. It was this supervision which was automatically to be ended by the happening of the event. The provision was inserted merely for the purpose of rendering unnecessary any formal action by the Secretary. It had nothing whatever to do with the Secretary's power or authority to approve a lease. In fact, that authority conferred by law could not be voluntarily surrendered by him.

II.

The Act of Congress approved March 1, 1907 (34 Stat. 1026), which provides, *inter alia*, that "the filing heretofore or hereafter of any lease in the office

of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice," was not repealed nor abrogated either by the Act of Congress providing for the admission of the State of Oklahoma into the Union, or by the Constitution of the State of Oklahoma, or by both together, and was in full force and effect at all of the times during which the transactions concerning the lands involved in this case took place.

It seems to us that, considering the situation as it actually existed when Oklahoma was admitted to the Union, the Act of Congress approved March 1, 1907 (34 Stat. 1026),

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice" (34 Stat. 1015),

was not repealed by either the Enabling Act or by the state constitution, or by both together.

Furthermore, even if this act of Congress was repealed upon the admission of the state into the union, nevertheless, the consequences to the parties litigant in this action would not be what appellant contends. Even in such event, the law would be with the lessees under the departmental oil and gas mining lease; their rights would still be paramount to any rights derived from the grant of the heirs of the lessor. Congress, having provided for the making of a lease for oil and gas, with the approval of the Secretary of the Interior, *and not otherwise*, transac-

tions between third parties, especially where the transactions occurred as here after the approval, could not have the effect to destroy and render vain and nugatory his action in the premises.

That the act in question has not been repealed appears to be settled by the decisions of both this court and the Circuit Court of Appeals for the Eighth Circuit.

—*Anicker v. Gunsburg*, 246 U. S. 110, 226 Fed. 176;

Scioto Oil Co. v. O'Hern, (Okla.) 169 Pac. 483.

And if the cases cited do not in fact settle the question, we nevertheless believe that the act of Congress, providing for the filing of leases in the Agency at Muskogee, and making such filing constructive notice, was not repealed but is still in full force and effect, because the whole matter is one of federal control, concerning which Congress alone had the power to legislate, and over which it had exercised its unquestioned authority; because the state had, by the express and explicit provision of its own constitution, adopted and accepted the provisions of the Enabling Act that so far as Indians and their property were concerned, the authority of the national government should be unimpaired by the erection of the state, and because the whole current of judicial utterances by the state, since statehood, clearly demonstrates that these provisions meant precisely what they said.

As we will set forth in the next succeeding subdivision of this brief, we are equally firm in our conviction that even if the Act of March 1, 1907, providing that the filing of leases at the Union Agency should be notice, was repealed and ceased to be of any further force and vitality from and after November 16, 1907, when the State of Oklahoma was admitted into the Union, that, nevertheless, the consequences assumed by appellant do not flow from it, but, on the contrary, a result directly the opposite must, upon well recognized principles, necessarily follow. We say this because if the admission of Oklahoma repealed the filing law of 1907, it necessarily repealed also the then existing federal act for the registration of land titles and left the matter at large, wholly unaffected by the provisions of any state statute with reference to the recordation of land titles; for, in this situation, being left without any provision by Congress upon the subject of record or notice, the rights of the parties would depend upon wholly different principles from those upon which modern recording acts are bottomed.

This must be so because it is a well settled proposition that such matters as patents, issued either by the General Land Office of the United States, or by the land office of the state, or the proceedings had in such department of the general government or the state government, are not required by state recording acts to be spread upon local records, in order to be effectual, and to impart notice to persons dealing

with the subject-matter, and afford protection to those who are the direct grantees of the government, or stand in the attitude of such, and because the Secretary of the Interior, under the federal acts as they existed at the times when the matters in this case transpired, constituted a special tribunal or agency, designated by the general government, for the ultimate granting of oil and gas mining privileges on the lands in question.

The reasoning of the Supreme Court of Oklahoma as to the continuance in force and effect of the congressional act is convincing. In *Scioto Oil Co. v. O'Hern*, *supra*, that court said:

“In the present case the Act of March 1st, 1907, requires the filing of such lease with the Union Agency, and specifically declares that such filing shall be notice, and all parties are charged with knowledge, of the existence of such leases when so filed, and have the right, under the law, to obtain all the information which was before given as a mere matter of courtesy. To say that Congress may still regulate and control the leasing of restricted lands and at the same time permit legislation of the state to interfere with such control and form the basis of rights acquired antagonistic to those acquired in pursuance to the congressional regulations, would be to deny full jurisdiction to Congress in the premises and would hamper and seriously retard the administrative department of the government in the performance of its functions with reference thereto.”

And the inference as to the intent of Congress deducible from that portion of the Act of May 27, 1908, quoted at page 23 of the appellant's brief, is directly the contrary of that suggested by appellant's counsel. Counsel has given only the proviso to second paragraph of section 3 of the act. The whole of the second paragraph reads as follows:

“That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under or by authority of any act of Congress, shall have power to cancel and annul any oil and gas mining lease on said lands, whenever the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situated.”

Congress was aware that these departmental leases would *not* appear on the local records. It was,

however, aware that from time to time federal control and supervision over lands upon which such leases existed would be relinquished. It accordingly provided in express terms that in such circumstances the owner might, by private contract with the lessee, abrogate such leases. To the end that such proceedings should appear in the local records where they properly belonged, it provided both that these cancellations should not only be executed in the form prescribed by the state law, but that they be actually recorded in the county where the land lay. As we have pointed out, it was not required that the original leases be executed in the form required by state law, or that they be recorded in the state registry. The act so far from being an abrogation or repeal of the federal provision in regard to notice of leases by filing in the Union Agency was supplementary to and the complement of that law. That Congress possesses now and has at all times possessed a paramount power over the subject, both by reason of its guardianship over the Indians and the express provisions of the federal and state constitutions is indisputable.

- Lone Wolf v. Hitchcock*, 197 U. S. 553;
Choctaw Nation v. United States, 119 U. S. 1;
Stephens v. Cherokee Nation, 174 U. S. 445;
United States v. Allen, 179 Fed. 13;
Tiger v. Western Inv. Co., 221 U. S. 286;
Indian Territory Ill. Oil Co. v. State of Oklahoma, 240 U. S. 522;

Act approved June 16, 1906, Sec. 3, Par. 3;
Ordinance accepting Enabling Act, Bunn's
Constitution, section 497, Volume 1,
Revised Laws Oklahoma, p. ccxi.

When the State of Oklahoma came into the Union, a very considerable portion of the lands in that part of the state which had formerly constituted the Indian Territory was still in the hands of dependent Indian people, over whom the government had, from its very foundation, exercised a guardianship, and which guardianship it was unwilling to relinquish. It, therefore, reserved to itself, as absolutely and as completely as though no state were to be created here, the right to determine for itself what was best for its wards, and the exclusive power of legislating on the subject. This was not in derogation of any power properly appertaining to the state. It was simply retaining in the hands of the national government a matter which had always properly belonged to the national government, and which until relinquished, did not fall within the plane of state control.

The very subject-matter with which we are dealing in this case was as completely excluded from the operation of state laws as the customs duties, or interstate commerce, or any other appropriate branch of federal legislation. There is no higher attribute of sovereignty than the taxing power, and yet, even as to that, the state has no control whatsoever over those things which fall exclusively within the sphere of federal control and that derive their existence and

authority from the national government and not from the state.

—*McCulloch v. Maryland*, 4 Wheat. 316, 429;
Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292;

Indian Territory Ill. Oil Co. v. State of Oklahoma, 240 U. S. 522.

Section 1 of the Enabling Act provides:

“That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.” 34 Stat. 267 (Bunn’s Const. and Enabling Act, section 503).

Section 3, article 1, of the State Constitution provides:

“The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that un-

til the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States." (Bunn's Const. and Enabling Act, section 4.)

It so appears that prior to and at the time of the admission of the State of Oklahoma, and ever since, the matter of providing when and how the restricted lands of allottees of the Five Civilized Tribes should be leased and worked for oil and gas mining purposes was within the exclusive domain of congressional action. We must look, not to the state laws, concerning the making of leases or the conveyancing of property, or the recording of land titles, for the solution of question pertaining to the rights of those claiming leasehold interests, but solely to the laws of the United States. Before there was ever any attempt to regulate conveyances or the recording of titles in Indian Territory, or any provision for the allotment of lands, there were laws authorizing the taking of mineral leases, under the supervision and with the approval of the Secretary of the Interior, in certain instances. It was not until the Act of Congress approved February 19, 1903 (32 Stat. 841), entitled "An act providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes," that there was any law for the local record of land titles in Indian Territory. The act cited adopted chapter 27 of Mansfield's Digest of the Statutes of Arkansas, and

divided the territory into recording districts and made certain changes to fit the situation to the actual condition of affairs to be met here. Before the passage of this act, the various allotment agreements had been negotiated with the Five Civilized Tribes, all of which carry provisions for the making of mineral leases, but all of them upon the condition that the same were to be subject to the approval of the Secretary of the Interior and in accordance with rules and regulations to be adopted and prescribed by him. By the subsequent act, approved April 26, 1906 (34 Stat. 137), it was required by section 20:

“That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing, and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court; *Provided, further*, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.”

Thus stood the law (the Congress being the sole legislative power on all subjects) at the time the matters and things transpired which gave rise to the case of *Shulthis v. McDougal*, 170 Fed. 529. Appellant is

in error in saying that case was decided prior to the Act of March 1, 1907, making leases filed at Union Agency, Muskogee, constructive notice. The case was decided after the act was passed, though the rights of the parties had been irrevocably fixed prior to its passage. In this situation, the Circuit Court of Appeals for the Eighth Circuit was constrained to hold that Congress had, by its own pronouncement, made the local recording law then in force in this jurisdiction applicable. That was a controversy between a lessee whose lease was dated prior to the deed under which the other party claimed, but of which the latter was held to have had no actual notice, and it was properly held that there was no constructive notice because the lease had not been recorded in compliance with existing provisions of law.

Other instances of like nature had arisen and were brought to the attention of Congress, and it being manifest that it could frequently happen that during the period while a lease was in process of going through the Department, a transfer of the lands involved might be effectuated, and the lessee defeated of his rights, and find that he had drawn a blank in the lottery of Indian Territory affairs, even after he had secured the approval of the Secretary of the Interior to his lease (because of statutes which Congress had itself enacted), there was incorporated in the Indian Appropriation Bill, approved March 1, 1907, the provision hereinbefore quoted, that "the filing heretofore or hereafter of any lease in the of-

fice of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice." Congress thus ordained that where one had negotiated an oil and gas mining lease with an allottee and had duly lodged the same in the Agency for the purpose of securing that approval of the Secretary which was necessary to give it final force and validity, he should be protected against the claims of all persons who acquired their rights subsequently.

The law is thus made by positive and unequivocal declaration to meet both the substantial equities of the situation and the necessary practical conditions under which the process of making these leases was carried on.

When the state was admitted to the Union, there was no longer any field of operation for the general federal laws which Congress had enacted with regard to the recording of land titles. That was a matter chiefly of state concern and within its proper domain. The state had an undoubted right to prescribe the necessary conditions to the assertion of effectual title to lands lying within its borders insofar as it did not thereby impair or hamper or interfere with a legitimate federal agency. The theretofore existing local recording act was, therefore, by necessary intendment, repealed. Precisely the opposite was true, however, of the leasing for oil and gas mining purposes of lands by allottees whose title was still subject to any governmental restriction. The federal

government was, through its own agencies and instrumentalities, to continue to authorize and approve oil and gas mining leases, and other dealings with restricted lands.

There was, consequently, still a distinct field of operation for the Act of March 1, 1907, with regard to the filing of leases at the Agency, and no rule, either of practical advantage or of technical construction, warrants the assumption that it was intended to be repealed. It was certainly much clearer, more explicit and freer from any possibility of controversy to have such statutory rule of notice in force than to have parties who were engaged in the acquisition of leases and the purchase of titles dependent upon general deductions and analogies for the fixing of their respective rights. It seems to us, therefore, manifest that there was no thought in the minds of the lawmakers that by the passage of the Enabling Act and the erection of a state here, the Act of 1907 would become *functus officio*. It harmonizes much better with the policy theretofore pursued by Congress, and with the security of titles, the orderly dispatch of business, and the general commercial welfare of the community, to hold that this law was in no sense repealed or impaired in its operation by any provision in the Enabling Act. We are confident that no such repeal or impairment was ever intended, and that this law is still a subsisting statute for the governance of all parties and cases falling within its purview. In this position, we think we are abundantly

reinforced by the whole current of state adjudications for the past ten years.

The state court has by repeated decisions recognized the inapplicability of state statutes to the matter of these allotted and restricted lands as to which Congress still retained its paramount control.

—*Wilson v. Morton*, 29 Okla. 745, 119 Pac. 213;
Chapman v. Siler, 30 Okla. 714, 120 Pac. 608;
Walker v. Brown, 43 Okla. 144;
Allen's Will, 144 Pac. 1055;
Carson v. French, 45 Okla. 819, 147 Pac. 319;
Ashton v. Noble, 46 Okla. 297, 148 Pac. 1043

We are unable to differentiate the principles underlying the foregoing adjudged cases and the question involved in the one at bar. If the existing acts of Congress with regard to matters retained in congressional control passed upon in those cases remained unrepealed after statehood, so that the statute of wills, the statute with regard to champerty and maintenance, the provisions of the state law with regard to the lien of judgments and the means of enforcing the same, were inoperative because of existing federal legislation enacted prior to statehood and unrepealed by either the Enabling Act or the state constitution, or both together, we are unable to perceive how or why the admission of the state swept away the federal statute providing that the filing of the lease in the Agency at Muskogee should be notice to the world, and required oil lessees of Indian lands, at their peril, to bring themselves within the letter of the state law, providing for the record of land titles.

We confidently insist that the federal statute of March 1, 1907, is still in force, and that by virtue thereof the holders of the departmental oil and gas mining lease are entitled to precedence over the lessee of the deceased allottee's heirs. The courts below were correct in so holding and should be affirmed.

III.

If the Act of March 1, 1907, should be held to have been repealed by the Enabling Act, and the admission of the State of Oklahoma into the Union, nevertheless the oil and gas mining lessees of Jennie Samuels under the departmental lease approved by the Secretary of the Interior, are prior in time and prior in right to those claiming under the subsequent leases made by the allottee's heirs after the approval of the former lease.

The foregoing proposition must be true, because if the admission of Oklahoma to statehood had the effect of working a repeal of the Federal Act of March 1, 1907, it also undoubtedly had the effect of repealing all other federal statutes with regard to the recording of leases and other land titles. There can be no question about the proposition that the recording laws of the state have no effect upon, and are not applicable to, those matters and things which are within the legislative control of Congress. If Congress has not provided any system of registration, nor enacted any law, by which the priorities of the parties are to be determined from the filing or re-

cording of an instrument in a given office, or if such statute has, it is ascertained, been repealed, then the matter is left wholly at large and must be determined upon general principles. We have already pointed out that it was the manifest purpose of Congress in passing the Act of March 1, 1907, not to leave the matter so at large, but fix a certain and definite test by which, in every instance, absolute notice should be brought home to all who dealt with the lands of these allottees.

We have urged, and with confidence, that this very fact negatives the idea that the congressional provision upon the subject, enacted in 1907, was ever intended to be repealed, or has, in fact, been repealed. But, assuming now that a repeal was intended and effected, we do not see how it can help the situation of appellant.

The matter of the making of leases upon lands situated as were the lands involved in this suit, when the original allottee signed and executed the oil and gas mining lease in question, was wholly within the control of the federal government. That government had provided how and in what manner such a lease could be made so as to have any effect and validity. It had expressly declared it might not be made otherwise. Such was then and is today the law of the land. It was the supreme law of the land. We do not see how it can be contended that any person had a right either in law or in equity, to deal with a piece of property, where there was in existence, either as a con-

summate fact, or potentially, because pending, a lease of this character upon the lands involved. The Secretary of the Interior was the agency designated by the general government through whom, and through whom alone, a lease of this kind could be made. The Secretary, as the head of the Department of the Interior, constituted a federal agency working out a policy of the federal government. It is the same department of the government and the same instrumentality in all essential particulars, as that by which the government disposes of its own public lands. This analogy has been frequently pointed out and referred to in adjudged cases:

—*Wallace v. Adams*, 143 Fed. 721;
Lowe v. Fisher, 223 U. S. 107;
Lynch v. Harris, 33 Okla. 23, 124 Pac. 50;
Bonifer v. Smith, 166 U. S. 849.

It appears to have been uniformly held that state recording laws are not applicable either to government patents or state patents, and that the records of the General Land Office are public records, copies of which are not required to be lodged in the local registry of land titles in order to afford protection to those who derive their rights through such proceedings.

—*Rhineheart v. Schuyler*, 7 Ill. 473;
Lomax v. Pickering, (Ill.) 46 N. E. 238;
Sayward v. Thompson, (Wash.) 40 Pac. 379;
Lemle v. Louisiana Farm Land Co., (La.)
66 So. 185.

In the case of *Lomax v. Pickering*, the Supreme Court of Illinois summarized the law as follows:

“Here the McClure deed, under which appellant claims, with the approval of the president indorsed thereon, was recorded in the recorder’s office of Cook County, March 11, 1871, while the Horton deed, containing the approval of the president, was not recorded until March 12, 1873; and it is contended that the deed first recorded, bearing the approval of the president, will take priority over the other deed, recorded at the later date. As respects the approval of the president, required by the treaty, and the provision in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the president in the department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the state required a copy of that record to be recorded in the recorder’s office where the land is located. A record of that character is similar to a patent issued by the president for lands that belong to the government, which is not required to be recorded in the county where the land is located.”

This case was affirmed by the Supreme Court of the United States (*Lomax v. Pickering*, 173 U. S. 26) and the above declaration of law quoted and approved.

Furthermore, it has been adjudged that the limitations and restrictions peculiar to Indian land titles and imposed by act of Congress need not be incorporated in a patent issued for the land. It is suf-

ficient that they are a part of the law, as declared by the Supreme law-making authority on the subject.

In *Felix v. Yaksum*, (Wash.) 137 Pac. 1037, it is said:

“Nor is it of any determinative force that the patent contains no restriction against alienation. The law becomes a part of the patent, and no federal official can waive or render inoperative, because of the failure to incorporate it, any limitation which Congress has imposed upon the title.”

Here in Oklahoma, the statutes of the United States authorize the making of oil and gas mining leases by allottees who hold a restricted title, through the agency of the Secretary of the Interior, *and not otherwise*. There is no provision of law requiring such a lease to be acknowledged. There is no precise form in which it is to be evidenced. That is all left to the determination of the special agency or tribunal—the Secretary of the Interior—designated by Congress for that purpose. There is no necessity, by any law now in existence (unless it be the Federal Acts hereinbefore referred to) which requires such a lease ever at any time to appear upon the local land records. And we think that there can be no question about the proposition we have already stated, that if the erection of Oklahoma into a state had the effect of repealing the Act of 1907, with regard to the notice to be imparted by the filing of a lease in the Agency at Muskogee, it also, necessarily, repealed the prior law with reference to recordation of such

instruments in the local land title register. As a matter of law it was not necessary that either the patent to the allottee or any mineral lease made by the allottee in this case upon his lands be recorded at any other place than the offices pointed out in the federal acts themselves. And, to say that the state can, by the enactment of a law providing for the record of land titles, destroy and render nugatory the force and effect of that which is done under the sanction of a national law dealing with a subject within its absolute legislative control, is directly counter to that control for which the general government stipulated when it provided for our coming into the Union, and to which the whole people, in most solemn manner, assented.

As between all parties who derive their interests through conveyances in no wise dependent upon federal supervision, doubtless the state law is determinative of their rights; but the state law ought to have no effect whatever, and can have no effect whatever, upon the determination of the relative rights of persons who derive their title through federal instrumentalities and those who claim from some other source.

It seems clear, therefore, that if the Act of March 1, 1907, which provided that the filing of leases at the Union Agency should be notice, was stricken down upon the admission of the state into the Union, then we have no statutory law upon the subject. We have seen that the state registration laws have no

applicability or effect. Congress, the only legislative body having authority to act in the premises, has remained silent except to declare by the Act of May 27, 1908, "That leases of restricted lands for oil, gas or other mining purposes, lease of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior, and not otherwise.*" In this situation of affairs an allottee of restricted lands signs and executes an oil and gas mining lease. This lease is governed by rules and regulations of the Secretary of the Interior, and according to those rules and regulations, must be filed at the Union Agency at Muskogee, and thence transmitted to Washington for the Secretary's approval. The Secretary, in this case, whatever the specific character of the functions he is performing, is the designated agency or instrumentality, appointed by the government, for consummating this sort of contract. It is beyond comprehension that it was ever for an instant supposed that either the original allottee, or any successor in title, would be able to dispose of such lands so as to cut off the rights of the lessee under a departmental lease duly approved. We cannot see any escape from the proposition that when the Secretary approved the lease involved in this case, it took effect precisely as though it had been presented to him for his approval and approved upon the very

day that it was executed. There being no law requiring its registration at any other place in order to give it validity, or requiring any record of the transaction to be made elsewhere than in the Department of the Interior, we feel that the court must hold and declare the law to be, that it was effectual against the whole world, and that the lessee, or grantee, under that document, has an unimpeachable title, notwithstanding the transactions between the heirs of the allottee and third persons, who are now claiming ownership of the property. We confidently believe that upon the examination of this case in its true light, the conclusion is inescapable that either the Federal Act of 1907 made the filing of leases at the Agency notice, or that, if said act be no longer in force, there is no statutory provision upon the subject and that the lease of appellees is entitled to precedence over the title of appellant as held by the court below.

IV.

The leases under which appellant is asserting its claim and which constitute its only alleged right in the premises, have never been approved by the Secretary of the Interior, as required by section 2 of the Act of Congress approved May 27, 1908 (35 Stat. 312), and are for that reason not valid instruments and confer no right on appellant.

Stated somewhat differently and a little more fully the proposition is: That where lands have been

allotted to full-blood Indians of the Five Civilized Tribes, and the allottee subsequently dies and the lands descend to heirs who are also full-blood Indians, no valid oil and gas lease of such lands may be made by these full-blood heirs, except with the approval of the Secretary of the Interior. Such inherited lands are still in the category of restricted lands by reason of the proviso to section 9 of the Act of May 27, 1908:

"That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

For the convenience of the court we will set forth in so many words, instead of merely making reference thereto, the pertinent parts of the Act (35 Stat. 312) and which appear in sections 1, 2, 5 and 9 thereof:

*"SECTION 1. Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: * * * and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-sixth, nineteen*

hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe * * *

“*Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years.*” (Italics supplied.)

“*Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument, or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted*

land made in violation of law before or after the approval of this act shall be absolutely null and void."

"*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the Act of April twenty-sixth nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

While it is true that the question involved has not been passed upon by this court in the precise form now presented, the principle involved has already been authoritatively decided.

—*Parker v. Richard*, 250 U. S. 235;

Parker v. Riley, 250 U. S. 66, 69.

In *Parker v. Richard*, *supra*, this court said:

“By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared in 9, ‘that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.’ In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words, it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court’s approval.”

The lands being restricted it inexorably follows that any attempted oil lease thereof without the Sec.

retary's approval is no lease at all because section two of the act plainly says "leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior * * * and not otherwise."

And this result is not the fruit of technicality but bottomed on sound reason.

The matter of leasing is easily differentiated from selling and conveying. The leasing involves much more than the mere contract at the time of making. In the event of the discovery and production of oil, it involves operation through a long and indefinite period. The two ideas have always been kept distinct, and dealt with separately, by the Congress in the enactment of its statutes. Throughout a period of many years, there has been the clearest sort of evidence that Congress desired to retain the approval of oil and gas leases, made by its Indian wards who were not fully competent to handle their own affairs, in the hands of the Secretary of the Interior. When it came to finally dealing with the specific subject of leasing, the language of section 2 of the Act of May 27, 1908, carries well nigh irresistible conviction that there was no thought, that as to part of these Indian wards in the Five Civilized Tribes not considered competent, the Secretary must approve their oil leases, while as to another class of incompetents, no such requirement was imposed.

If it be urged that so far as absolute sale of the land was concerned this very thing was in fact done

by vesting power of approval in the County Courts, the very obvious answer is that the two are not the same. While sale of the land would sometimes involve large value, ordinarily and generally this would not be true. Besides it would present but a single and complete transaction. On the other hand, the oil lease very frequently and generally involves huge values. It is a complex matter. It is only begun when the contract is made. The wealth it produces usually comes later. It is problematic how great a fortune will be involved. The Indian may become a millionaire over night, and continued supervision be more absolutely essential than ever before. The County Court could only approve—its function ended there. It had neither authority nor machinery for going further. The Secretary had both. Were not all these matters present in the minds of the legislators? And when they broadly provided that oil and gas leases of restricted lands might be made with the approval of the Secretary, *and not otherwise*, we think it much more in harmony with the entire legislative scheme, that they must have meant, and did mean, to retain this jurisdiction in the Secretary, wherever there remained any sort of restriction or limitation on the allottee or his land.

There is no pretense in this case that any approval by the Secretary of the leases under which appellant is claiming was sought or had. Without it, they were mere scraps of paper. Appellant has not shown either equitable claim or legal right, and the

decisions of the two courts below should be affirmed on this ground, independently of the other propositions.

We urge, therefore, that upon this record it appears the lease of appellees was properly approved; that it is prior in time and prior in right to any claim of appellant; that the leases of appellant are without validity; and the opinion of the Circuit Court of Appeals and decree of the District Court should be affirmed.

Respectfully submitted,

A. A. DAVIDSON,

PRESTON C. WEST,

Solicitors for Appellees,

W. H. Gray, F. D. McDonnell,

Charles Egan and F. C. Giddings.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1920.

No. 188.

ANCHOR OIL COMPANY, *Appellant*,

vs.

W. H. GRAY, *ET AL.*, *Appellees.*

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IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1920.

No. 188.

ANCHOR OIL COMPANY, *Appellant,*
vs.
W. H. GRAY, *ET AL., Appellees.*

BRIEF OF *AMICI CURIAE.*

May It Please the Court:

On account of the vast and far-reaching importance of the very first question in this case, to-wit, "Is an oil and gas mining lease executed since May 27, 1908, by a full-blood Creek Indian heir of a deceased allottee void without the approval of the Secretary of the Interior?" we beg to be heard on behalf of numerous oil lessees, not parties to this case, who have invested millions of dollars in oil leases executed by full-blood heirs since the Act of Congress of May 27, 1908, with the approval of the County Courts.

In further explanation of our intervention with this brief, we emphatically state that neither our cli-

ents nor the oil producers in general are averse to the policy of the Federal Government in interposing governmental supervision over the leasing of Indian lands for oil and gas purposes. While the full-blood Indian heir is not always competent to protect his interest without the assistance of some federal agency, he is by no means free from cunning, greed, graft, and avarice. When property becomes valuable for oil, the scheming and unscrupulous grafter can easily prevail upon an Indian to prefer false and groundless charges that the lease was obtained by fraud. Whereas, when the lease has been approved by the Interior Department or the County Court, or some federal agency, the Government representatives are good witnesses for the operator, and as a consequence very few suits have been commenced attacking leases approved by the Secretary or by the County Court.

Some sort of governmental supervision seems to impart to such leases a certain immunity from attack by designing grafters. But here the Interior Department claimed no jurisdiction to approve leases executed by full-blood heirs for about 10 years, and though hundreds of such leases were made and approved by the County Courts, the Federal Government has not assailed their validity, nor did the Interior Department call them in question until about two years ago.

Now to go back and sustain Departmental jurisdiction and adjudge all such leases void without the

Secretary's approval, though approved by the County Courts, means financial ruin and disaster to hundreds of honest operators and those who have invested their money in such enterprises.

The appellant, as plaintiff below, claims the oil and gas mining leasehold rights in the land in question under two oil and gas mining leases executed by the full-blood Creek Indian heirs of the deceased full-blood Indian allottee, Jennie Samuels, who died on October 11, 1915, after having executed a lease on the Departmental form on December 5, 1914, under which appellees claim the oil and gas mining leasehold rights. It is admitted that Jennie Samuels, being a full-blood Creek Indian, could not lease her land for oil purposes except with the approval of the Secretary of the Interior. Her lease of December 5, 1914, on the form prescribed by the Secretary of the Interior and expressly made subject to his approval, was not approved by the Secretary until October 21, 1915, 10 days after her death. Appellant contended in the District Court and in the Court of Appeals that the Secretary's approval after the death of the allottee was a nullity upon the theory that the Act of Congress of May 27, 1908 (35 Stat. L. 312), Section 9 thereof, abrogated the Secretary's jurisdiction, etc. We are not concerned with that point. If, however, the full-blood Indian heirs of the deceased allottee had no power to lease the land without the approval of the Secretary of the Interior, then the appellant's case at its very threshold must

be dismissed under the well settled principles that a plaintiff without right or title can have no relief by way of cancellation, injunction, etc., against a defendant. The leases under which appellant claims were not approved by the Secretary of the Interior, but approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee, and, of course, if the Secretary's approval is necessary to the validity of appellant's leases, they are void for want of his approval and consequently the court will not enter upon a consideration and decision of the questions presented against the validity of the prior lease executed by the allottee during her lifetime.

The Question:

The question whether or not full-blood Indian heirs can lease inherited allotments for oil and gas with the approval of the County Court having jurisdiction of the estate of the deceased allottee, and without the approval of the Secretary of the Interior, involves a consideration of the history of the various laws pertaining to the affairs of the Five Civilized Tribes, and immediately and ultimately involves the construction of the Act of Congress of May 27, 1908 (35 Stat. L. 312), and particularly the following sections:

Sec. 2. "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an

adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Sec. 3. "That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

"That no oil, gas or other mineral lease entered into by any of said *allottees* prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act, but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Pro-*

vided, That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate."

Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That *no conveyance of any interest* of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until

April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided, further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

We submit the following premises:

POINT ONE.

The general restriction against alienation imposed by the various agreements with the respective nations comprising the Five Civilized Tribes and the various Acts of Congress, operated to prohibit not only conveying the fee title by deed, but also leasing for mineral purposes—or said another way—the general restriction against alienation was a ban on leasing as well as on deeds because a lease is an alienation.

POINT TWO.

The converse of Point One is true: the removal of restrictions against alienation is a removal of restrictions against leasing.

POINT THREE.

Unless clearly and expressly provided otherwise, the restriction against **CONVEYING**, without the approval of a **DESIGNATED** Federal agency—the Secretary of the Interior or the County Court—includes a restriction against leasing for mineral purposes without the approval of the **SAME** Federal agency.

POINT FOUR.

The removal of all restrictions against alienation of allotments inherited by adult mixed-blood Indian heirs, coupled with the grant of power to full-blood Indian heirs to make **CONVEYANCES** of inherited allotments with the approval of the Secretary of the Interior, included the grant of power to such full-blood heirs to lease for mineral purposes inherited lands with the Secretary's approval. (See Section 22 of the Act of April 26, 1906, 34 St. L. 137.)

Section 22 of the Act of April 26th, 1906, is as follows:

“That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory,

then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances* made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

POINT FIVE.

Likewise, under Section 9 of the Act of Congress of May 27th, 1908, the power of a full-blood Indian heir to make a "CONVEYANCE OF ANY INTEREST OF (SUCH) ANY FULL-BLOOD HEIR IN SUCH" inherited land with the approval of the County Court, conferred the power to lease inherited land for mineral purposes with the approval of the SAME Federal agency—the proper County Court.

POINT SIX.

An examination of the various agreements with the respective tribes and Acts of Congress pertaining to the Indians, discloses a consistent legislative scheme to impose in each act, *first*, general and absolute restrictions against alienation, and, *second*, then by a proviso to the paragraph imposing the general restrictions or by another paragraph in the nature of a proviso, modify the general restrictions so as to permit leasing for a limited period or with the approval of the Secretary of the Interior, or the County Court.

The premises and conclusions set forth in the

above five points are clearly sustained by an examination of the various agreements with the tribes and Acts of Congress pertaining thereto.

A.

Statutes in pari materia are to be construed together; each legislative act is to be interpreted with reference to other acts relating to the same matter or subject.

It is unnecessary to cite authorities in support of the above proposition, as this court has frequently applied this rule in construing the Indian Agreements and Acts of Congress pertaining to the Five Civilized Tribes as well as other tribes.

—*Tiger v. Western Investment Co.*, 221 U. S. 286;
United States v. First National Bank, 234 U. S. 246;
Heckman v. United States, 224 U. S. 413;
Mullen v. United States, 224 U. S. 448;
Goat v. United States, 224 U. S. 458.

However, Black on Interpretation of Laws, page 204, says:

“The reasons which support this rule are two-fold. In the first place, all the enactments of the same legislature on the same general subject-matter are to be regarded as parts of one uniform system. *Later statutes are considered as supplementary or complementary to the earlier enactments.* In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the *continued mod-*

ification and adaptation of the original design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the *existing legislation on the same subject*, and to have shaped its new enactment with reference thereto. Hence the same principle which requires us to study the context for the meaning of a *particular phrase or provision*, and which directs us to compare all the several parts of the same statute, only takes on a broader scope when it bids us read together, and with reference to each other, all statutes *in pari materia*. *Whatever is ambiguous or obscure in a given statute will be best explained by a consideration of analogous provisions in other acts relating to the same subject, or by a study of the general policy which pervades the whole system of legislation. Secondly*, the rule derives support from the principle which requires that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between different enactments of the same legislature. To achieve this result, it is necessary to consider all previous acts relating to the same matters, and to construe the act in hand so as to avoid, as far as it may be possible, any conflict between them. Hence, for example, when the legislature has used a *word* in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using the word in the same sense, unless there is something in the context or in the nature of things to indicate that it intended a different meaning thereby."

See also, Endlich on Interpretation of Laws, Section 53.

B.

Although the courts in arriving at a construction of a particular Act of Congress should examine the prior state of the law and consider statutes in pari materia, the clear meaning of a statute can neither be avoided nor subverted in the name of so-called public policy. The public policy of a state or nation must be determined by its constitution, laws and judicial decisions, and not by the varying opinion of laymen, lawyers or judges as to the demands or interests of the public. Restrictions against leasing for mineral purposes without the approval of the Secretary of the Interior cannot be judicially imposed in the name of so-called Indian policy, if there is any such thing.

Thus, in *United States v. First National Bank*, 234 U. S. 245-260, this court in refusing to sustain the contention of the Government that certain Indian lands were within the restrictions against alienation, said:

"The Government further insists that its interpretation of the act is consistent with its policy to make competency the test of the right to alienate, and that the legislation in question proceeds upon the theory that those of half or more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of such blood. But the policy of the Government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this

case, afford an unstable ground of statutory interpretation.” (Italics ours.)

In determining what is the policy of Congress with respect to the question involved in this case, the court must find that policy expressed in the statutes and various agreements with the tribes and judicial decisions based thereon, and the varying opinion of laymen, lawyers or judges as to the demands or interests of the Indians have nothing to do with this case.

- Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 44 L. ed. 84;
Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 70 Fed. 201, 30 L. R. A. 193;
United States v. Trans-Missouri Freight Association, 58 Fed. 58, 24 L. R. A. 73;
Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. ed. 205;
People v. Hawkins, 157 N. Y. 1, 68 Am. St. Rep. 736;
Swann v. Swann, 21 Fed. 299.

Prior Laws.

The Original Curtis Act (30 Stat. L. 495), approved June 28, 1898, authorized the Dawes Commission to make up a roll of the citizens of the various tribes, to-wit: Choctaws, Chickasaws, Cherokees, Seminoles and Creeks. Section 11 directed the Dawes Commission, when the rolls were complete, to “proceed to allot the exclusive use and occupancy of the surface of the lands of the nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll.” Under the said Original Cur-

tis Act the Dawes Commission opened a land office at Muskogee on April 1st, 1899, and made about 8,000 Creek allotments. The allottees took no assignable or inheritable interest or anything more than the right to use and occupy the surface during their lifetime. (*Woodward v. deGraffenried*, 238 U. S. 284.) *There were no Curtis Bill allotments made in any of the other tribes.* The Curtis Bill allottee acquired no title to the minerals, but Section 13 of the act authorized the Secretary of the Interior to make oil, coal, asphalt and other mineral leases, neither the consent of the tribes nor individual citizens being necessary.

Creek Agreements:

Thereafter, and in 1900, the Dawes Commission negotiated an agreement with the Creek tribe, which was approved by the Act of Congress of March 1st, 1901 (31 Stat. L. 861), ratified by the Creek Nation May 25, 1901. We shall herein refer to the above agreement with the Creek tribe, approved by the Act of March 1, 1901 (31 Stat. L. 861), as the "Original Creek Agreement." This agreement provided for the allotment of the tribal land to the citizens in fee, thus conveying to the allottees the absolute legal and equitable title to the land, including all minerals therein. By virtue of Section 6 of the Original Creek Agreement, Curtis Bill allotments were confirmed and the fee title vested in the allottee, if living, or in his heirs, if deceased. (*Woodward v. deGraffenried*, 238 U. S. 284.)

Section 7 of the Original Creek Agreement provides that:

“Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed of the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior,”

and made further provisions about the homestead which is not pertinent here.

The Original Creek Agreement made no express provision for *mineral leases*, but Section 37 thereof provided that “Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction, if adjoining allottees are not injured thereby, and cattle grazed thereon shall not be liable to any tribal tax, etc.” The declaration under Section 7 of the Original Creek Agreement that “such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior,” was held by the Oklahoma Supreme Court in *Barnes v. Stonebraker*, 28 Okla. 75, to be a restriction against leasing the allotment for oil and gas purposes, without the Secretary's approval. That decision is based upon the theory that an oil and gas mining lease is an

alienation, and Section 7 having prohibited the alienation without the Secretary's approval, an unapproved lease was void.

Thereafter, and in 1901, the Dawes Commission negotiated a Supplemental Agreement with the Creek tribe, which was approved by the Act of Congress of June 30, 1902 (32 Stat. L. 500), ratified by the Creek Nation July 26, 1902, and made effective by Presidential Proclamation on August 8, 1902. We shall refer to that Act of Congress as the "Supplemental Creek Agreement." Section 16 of the Supplemental Agreement is a substitute for Section 7 of the Original Creek Agreement, and is as follows:

"Lands allotted to citizens shall not in any manner whatever, or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any rea-

son such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Section 37 of the Original Creek Agreement was amended by Section 17 of the Supplemental Creek Agreement to read as follows:

"Creek citizens may rent *their allotments*, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for *mineral* purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cat-

tle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and Section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands."

Choctaw-Chickasaw:

Provision was made for the allotment of the Choctaw and Chickasaw lands by what is known as the "*Atoka Agreement*" embodied in Section 29 of the Curtis Bill, being the act approved June 30, 1898 (30 Stat. L. 495). The *Atoka Agreement* made provision for allotment to the Indians and freedmen and provided that "all coal and asphalt in or under the lands allotted and reserved from allotment, shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freedmen," and further provided:

"It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations shall remain and be the common property of the members of the Choctaw and Chickasaw Tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes."

Provision was made for the payment of royalties from the coal and asphalt into the Treasury of the United States, to be drawn therefrom under rules and regulations prescribed by the Secretary of the Interior. With respect to restrictions against alienation, the Atoka Agreement provided:

“All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed *twenty-one years from date of patent*, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

“That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void.”

Under the above quoted provision, the entire allotment was (a) non-taxable while the title remained in the original allottee, not to exceed 21 years from the date of patent; (b) the homestead of 160 acres was inalienable for 21 years from date of patent;

(c) the surplus was alienable, one-fourth in one year, one-fourth in three years, and the balance in five years from the date of patent; (d) contracts for the sale or incumbrance of any of the allotment were declared null and void. The Secretary of the Interior was not given the authority to approve conveyances. The restrictions against alienation for the period designated were absolute. The only provision with respect to leasing is as follows:

“No *allottee* shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States Court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder, and no such lease or any sale shall be valid as against the *allottee* unless providing to him a reasonable compensation for the lands sold or leased.”

The restrictions against alienation ran with the land, and operated to bind the heir, as well as the allottee. The clause against alienation did not say that the *allottee* shall not alienate but that the homestead “shall be inalienable for 21 years from date of patent,” and that the surplus “shall be alienable * * * one-fourth in one year, one-fourth in three years, and the balance * * * alienable in five years from the date of the patent.” The statutory dec-

laration that the allotment shall be inalienable for a designated period of time without prohibiting any particular person, that is, the allottee, from alienating within that period, imposed restrictions on the land. The restrictions under the language used were not personal but ran with the land and bound the heirs as well as the allottee. This court so held in construing a similar restriction in *Bowling v. United States*, 233 U. S. 528. See also:

United States v. Noble, 237 U. S. 74;

Aaron v. United States, 204 Fed. 943;

Reed v. Clinton, 23 Okla. 610.

But a statute not declaring in substance that "the lands allotted shall not be alienated" before the end of a specified number of years or that "lands allotted shall not be alienated by the allottee or his heirs" before the end of a designated period imposes no restraint on the allottee's heirs, though it may expressly prohibit the allottee from alienating. Thus a statute prohibiting "alienation by the allottee" or declaring "lands allotted shall not be alienated by the allottee" does not restrain the heir. Such restrictions are merely personal to the allottee like the disability of minority or of a married woman under the common law, and the heirs are free to alienate.

—*Clark v. Lord*, 20 Kan. 390;

McMahon v. Welsh, 11 Kan. 280;

Oliver v. Forbes, 17 Kan. 128;

Hancock v. Mutual Trust Co., 24 Okla. 391;

Frederick v. Gray, 12 Kan. 518.

Restrictions against alienation by Indian heirs will not be implied from the circumstance that the allottee was restrained from alienating.

—*Skelton v. Dill*, 235 U. S. 206;
Adkins v. Arnold, 235 U. S. 417.

The above quoted provision in regard to leasing is, in effect, a removal of restrictions against alienation to the extent that the *allottee* may lease his allotment, or a portion thereof, for a period not longer than five years, and without any privilege of renewal. It is clear under the authorities we shall hereafter cite that a broad restriction against alienation and incumbering includes all degrees of alienation, such as leasing. Especially a mineral lease for oil, gas, coal, or any other mineral purpose authorizing the lessee to extract from the allotment the minerals, is an alienation within the meaning of the act. As the coal and asphalt were reserved to the tribe, the allottee had no authority to lease his land even for five years for coal or asphalt purposes.

Now we pass to the Choctaw-Chickasaw Supplemental Agreement:

The Supplemental Agreement with the Choctaw-Chickasaws was approved by Act of Congress of July 1, 1902, and ratified by the nations and became effective September 25, 1902 (32 Stat. L. 641). Section 26 of that agreement authorized the Secretary of the Interior to segregate and reserve from allotment lands containing coal and asphalt deposits, and sections 56 to 63, inclusive, provide for the segrega-

tion and sale of coal and asphalt lands. Section 58 prohibits the allotment of the segregated coal and asphalt lands, but provides that "*all coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands.*" Section 61 prohibits the leasing of coal and asphalt lands "the provisions of the Atoka Agreement to the contrary notwithstanding." While the Supplemental Agreement is comprehensive and apparently covers the whole subject of allotting the tribal lands, it contains no reference to the leasing of allotments by either the allottee or his heirs for either agricultural or mineral purposes; but specific and express provisions restricting alienation by the allottee or his heirs are contained in the Supplemental Agreement. Thus, Section 12 is as follows:

"Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

The above restrictions against the alienation of the 160-acre homestead being for a period "during

the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment," is NOT by itself a restriction against alienation by the heirs.

Section 13 applies to freedmen and restrains the alienation "during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of the allotment." Section 15, is as follows:

"Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Section 16 is as follows:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That *such land* shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

The only restrictions against alienation by the heirs are found under Section 16 above quoted. That express restriction against alienation by the heirs was no doubt inserted because the restrictions imposed by the preceding sections clearly did not run with the land, but applied to the allottee in person.

This court construed Sections 12, 15 and 16 in *Gannon v. Johnston*, 243 U. S. 108, and held that Section 16 expressly applied restrictions to the heirs. Mr. Justice DAY, speaking for the court, said:

“Section 16 makes the land alienable after the issuance of patent, except as to the homestead, *not involved here*, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years from the date of the patent, and provides that the lands shall not be alienable by the allottee, ‘or his heirs,’ at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than the appraised value.”

The Secretary was given no power to either remove the restrictions or approve conveyances in fee or by lease.

The restrictions against alienation imposed by Sections 12, 13, 15 and 16 of the Choctaw-Chickasaw Supplemental Agreement disqualified the allottee and *his heir* from leasing the allotment for oil and gas purposes, as such a lease grants to the lessee the right to occupy the land and extract therefrom a portion of the corpus thereof—frequently the most valuable part of the allotment.

These unqualified restrictions either operated to repeal the prior provisions of the Atoka Agreement allowing the allottee to lease for a period not exceeding five years without the Secretary’s approval or left the allottee possessed of the power to lease the allotment for a period not beyond five years for

mineral and agricultural purposes, without the Secretary's approval. If the leasing provision of the Atoka Agreement modifying the restrictions against alienation imposed by the Atoka Agreement, so as to permit the allottee to lease his allotment for a period not beyond five years without the privilege of renewal, survived the Supplemental Choctaw-Chickasaw Agreement—that is, if the leasing provision of the Atoka Agreement was not repealed by the Supplemental Agreement on the theory that the Supplemental Agreement is general, whereas the leasing provision of the Atoka Agreement was special legislation—then we have the allottee empowered to lease his allotment for oil and gas purposes for a period not beyond five years without the Secretary's approval or the approval of any other federal agency, and that state of affairs existed as to full-blood allottees and full-blood heirs until the Act of April 26th, 1906 (34 Stat. L. 137), and as to mixed-blood allottees until the Act of May 27, 1908 (35 Stat. L. 312). A general restriction against alienation includes within its scope a prohibition against leasing, although leasing may not be expressly mentioned.

—*Beck v. Flournoy Live Stock & Real Estate Co.*, 65 Fed. 30;

United States v. Flournoy Live Stock & Real Estate Co., 69 Fed. 886;

United States v. Flournoy Live Stock & Real Estate Co., 71 Fed. 576;

Taylor v. Parker, 235 U. S. 42.

The Kansas Constitution declares that the family homestead “shall not be alienable without the

joint consent of husband and wife," and the Supreme Court of that state has several times held that an oil lease on the family homestead, executed by the husband, the owner of the title, is void unless joined in by the wife.

- Coughlin v. Coughlin*, 26 Kan. 116;
- Franklin Land Co. v. Wea Gas, Coal & Oil Company*, 43 Kan. 518;
- Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311, 59 Pac. 640;
- McKinnis v. Mortgage Company*, 55 Kan. 259;
- Brewster v. Madden*, 15 Kan. 195.

The Oklahoma Supreme Court in two cases has held that an oil and gas mining lease on the family homestead is void unless jointly executed by husband and wife, although the title may be entirely in one spouse.

- Carter Oil Company v. Papp*, .. Okla., 174 Pac. 747;
- Francen v. Oklahoma Star Oil Company*, (not yet officially reported) 13 Okla. App. Court Rep. 313, ... Pac.

Under the Texas Constitution providing that the homestead of a family cannot be conveyed by the owner if a married man without the signature and separate acknowledgment of the wife, the husband alone cannot give a lease authorizing the lessee to bore and extract oil and gas from the homestead.

- Southern Oil Co. v. Colquitt*, 69 S. W. 169;
- Houston & T. C. Co. v. Cluck*, 72 S. W. 83.

That a lease is an alienation within the meaning of the restriction against conveying a homestead without the joint consent of husband and wife, see *Mailhot v. Turner*, 157 Mich. 167, 133 Am. St. Rep. 333; *Maatta v. Kippola*, 102 Mich. 116, 60 N. W. 300; *Pritchett v. Davis*, 101 Ga. 236, 65 Am. St. Rep. 298.

If the leasing provision of the Atoka Agreement was repealed, there was no law under which a Choctaw-Chickasaw *full-blood* allottee, or his heirs, could lease the allotment for oil and gas purposes until the Act of Congress of April 26th, 1906, Sections 19, 20 and 22 (34 Stat. L. 137), and no provision under which a *mixed-blood allottee* could lease for mineral or any other purpose until the Act of May 27th, 1908 (35 Stat. L. 312), except that part of the allotment other than the homestead (the surplus) after the restrictions expired under the Supplemental Agreement limitations.

Section 13 of the Curtis Bill, approved by Act of Congress of June 28, 1898 (30 Stat. L. 495), says:

“That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void.”

and provided what shall be done with the royalties, etc. But, as above pointed out, Section 58 of the Choctaw-Chickasaw Supplemental Agreement vest-

ed the oil and gas and all other minerals (except coal and asphalt in segregated lands) in the allottee, and of course that operated either to abrogate the authority of the Secretary of the Interior conferred by Section 13 of the Atoka Agreement to lease the allotted tribal lands for oil and gas, or left that exclusive power in the Secretary. If the power was left in the Secretary to make oil and gas leases on allotted lands in the Choctaw - Chickasaw Nations, then the allottee had no such authority because it is obvious that Congress did not intend to give the Secretary authority to lease allotted lands and at the same time confer authority on the allottee to lease his own allotment. Such a situation is unheard of in the first place, and in the second place it would have created a conflict between the allottee and the Secretary of the Interior and brought about confusion. The Secretary of the Interior never claimed any jurisdiction to execute leases for oil or mineral purposes on allotted lands in the Choctaw and Chickasaw Nations. The only regulations prescribed by the Secretary under the authority of Section 13 of the Atoka Agreement are the regulations of November 4, 1898, and those regulations clearly show that they pertain exclusively to unallotted lands. Then besides, Section 61 of the Supplemental Choctaw and Chickasaw agreement expressly prohibits leasing for coal and asphalt purposes. Another significant thing is this: While the Secretary of the Interior prescribed rules and regulations from time to time under Section 17 of the Supplemental Creek Agreement

of 1902, and Section 72 of the Cherokee Agreement of 1902, with regard to oil and gas leases subject to his approval, he never at any time prescribed oil and gas rules and regulations with respect to such leases on Choctaw-Chickasaw allotments. The first Departmental rules applying to the Choctaw and Chickasaw allotments were prescribed by the Secretary under the authority of Sections 19, 20 and 22 of the Act of Congress of April 26, 1906. Those rules and regulations are general and apply to all the tribes.

We will discuss the Act of April 26, 1906, later and show that even under that act mixed-blood Choctaw and Chickasaw allottees and mixed-blood heirs could not lease allotted lands for oil and gas purposes except that part of the surplus upon which restrictions had expired under the limitations imposed in Sections 15 and 16 of the Choctaw Chickasaw Supplemental Agreement. It must be remembered that in 1906 no oil or gas had been discovered or searched for in the Choctaw-Chickasaw Nation.

Cherokee Agreement:

The only agreement with the Cherokees is embodied in the Act of Congress of July 1, 1902 (32 Stat. L. 716), and ratified by the Cherokee Nation, August 7, 1902. Sections 13, 14 and 15 contain express restrictions against alienation or encumbering the allotment for a period of five years, either by the allottee or the heirs, and exempts the allotment from taxation and debts and obligations of the allottee. Section 72 of the Cherokee Agreement con-

tains the provisions in regard to leasing for agricultural, grazing and mineral purposes, and prohibits leases for a longer period than one year for grazing purposes and authorizes leases "for a period longer than five years for agricultural purposes and for mineral purposes," with the approval of the Secretary of the Interior. Section 72 is as follows:

"Cherokee citizens may rent *their allotments* when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to remove the same; but leases for a period longer than one year for grazing purposes, and for a period longer than 5 years for agricultural purposes and for *mineral purposes* may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced in to the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands."

Seminole Agreement:

The Original Seminole Agreement was negotiated December 16, 1897, and approved by Act of Con-

gress of July 1, 1898 (30 Stat. L. 567). While the Seminole Agreement provides for an allotment of the lands in fee, the tribe reserved a qualified interest in all coal, mineral, oil, and gas, it being expressly provided that "no lease of any coal, mineral, coal oil, or natural gas, within said nation shall be valid unless made with the tribal government, by and with the consent of the allottee, and approved by the Secretary of the Interior." It is further provided that should any of said minerals be discovered on any allotment, one-half of the royalty should be paid to the allottee and the other one-half into the treasury of the tribal government. The allottee was authorized to lease his allotment for any period not exceeding six years, but the Secretary had no jurisdiction over the leasing other than mineral as above pointed out, it being provided that no lease should become effective until it was approved by the Principal Chief of the Seminole Tribe. It was further provided that "All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void." Also further provided that, "Each allottee shall designate one tract of forty acres which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity." The Seminole agreement was construed in *Goat v. United States*, 224 U. S. 456, in which this court said (224 U. S. 470), "The interest of the allottee was a descendible interest." A Supplemental Agreement was negotiated with the Seminoles and approved by Act of Congress of June 22,

1900 (31 Stat. L. 250), but it contains nothing on the subject of restrictions or leasing. Thus the matter stood under the various agreements negotiated with the respective Indian Nations composing the Five Civilized Tribes.

A Brief Resume'.

Seminoles:

The Seminole allottee, while he could lease his allotment with the approval of the Principal Chief for a period not exceeding six years, had no authority to lease his allotment for oil or gas or any mineral purposes. The tribal government had the authority to make the mineral leases with the consent of the allottee and the approval of the Secretary of the Interior.

Choctaw-Chickasaw:

The Atoka Agreement reserved all the coal and asphalt within the Choctaw and Chickasaw Nations as the common property of the tribe, freedmen excepted, and no patent to an allottee was to convey any title to the coal and asphalt. Provision was made for coal and asphalt leasing of the Choctaw-Chickasaw lands by the Secretary of the Interior. The Supplemental Choctaw-Chickasaw Agreement (Section 61 thereof) says that, "No lease of any coal or asphalt lands shall be made after ratification of this agreement, provisions of the Atoka Agreement to the contrary notwithstanding." No reference is made to the oil and gas and the Choctaw-Chickasaw

allottee, by virtue of his patent, became the owner of all the oil and gas in his allotment. There is no provision in either of the Choctaw-Chickasaw agreements authorizing the allottee or his heirs to lease the allotment for oil and gas, unless that power existed under the leasing provision of the Atoka Agreement by which the allottee could lease for not over five years without the Secretary's approval.

Cherokee:

The Cherokee allottee acquired title to the oil and gas in his allotment and was prohibited by Section 72 of the agreement from leasing his allotment "for mineral purposes" except with the approval of the Secretary of the Interior.

Creeks:

The Creek allottee acquired title to all the minerals in his allotment, including the oil and gas, and while the Original Creek Agreement made no reference to mineral leases, the Supplemental Agreement, Section 17 thereof, prohibited "leases for mineral purposes except with the approval of the Secretary of the Interior.

Indian Appropriation Act of April 21, 1904.

Thus the matter stood when Congress passed the Indian Appropriation Act, approved April 21, 1904 (33 Stat. L. 189), one paragraph of which is as follows:

"And all the restrictions upon the alienation of *lands* of all allottees of either of the Five

Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

Judicial and Departmental Construction of the Indian Appropriation Act of April 21, 1904.

On the 2nd day after the Act of April 21, 1904, the Secretary of the Interior requested an opinion from Assistant Attorney General Campbell, as to whether or not the Act of April 21, 1904, removing restrictions against alienation also repealed restrictions against leasing insofar as allottees not of Indian blood were concerned. Assistant Attorney General Campbell rendered a written opinion (see Appendix "A" hereto) holding that the Indian Appropriation Act only removed restrictions against the sale or conveyance of the fee, and that the Secretary of the Interior still retained jurisdiction over the leasing of the lands of adult citizens not of In-

dian blood. Assistant Attorney General Campbell supplemented that opinion by another opinion of July 21, 1905, again holding that the restrictions against leasing for mineral purposes by allottees not of Indian blood were not repealed by that act. (See Appendix "B" hereto.)

The Oklahoma Supreme Court, in *Eldred v. Okmulgee Loan & Trust Company*, 22 Okla. 742, in an opinion handed down December 1, 1908, and in *Sharp v. Lancaster*, 23 Okla. 349, in an opinion handed down March 9, 1909, held that an oil and gas mining lease was an alienation and a conveyance of an interest in the land within the meaning of the Indian Appropriation Act of April 21, 1904, and that the Secretary's approval was not required.

Thereafter, the Interior Department abandoned claims of jurisdiction, as shown by the opinion of the United States Circuit Court for the Eastern District of Oklahoma, in *Moore v. Sawyer*, 167 Fed. 826, in which the federal court held that an oil and gas lease was an alienation and that a citizen not of Indian blood had authority to lease his allotment, exclusive of the homestead from which restrictions were not removed, for oil and gas purposes without the approval of the Secretary of the Interior.

Now it will be observed that the restrictions against alienation imposed by the various treaties and agreements with the respective tribes, prohibited the alienation of the allotment by the allottee, or his heirs, for a certain definite period of time, and

all citizens of the tribes other than those not of Indian blood remained under those restrictions until they expired by limitation or were removed by the Secretary of the Interior, or the Act of Congress of April 26, 1906 (34 Stat. L. 137).

Act of April 26, 1906.

The Act of April 26, 1906, entitled, "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory and for Other Purposes," by Section 19 thereof, extended all restrictions against alienation by full-blood *allottees* for a period of 25 years from and after the passage of the approval of that act "unless such restrictions shall, prior to the expiration of such period, be removed by Act of Congress." Section 22 of the act removed all restrictions against alienation by the heirs of a deceased allottee with this limitation: All conveyances made by full-blood Indian heirs required the approval of the Secretary of the Interior in order to be valid. *Tiger v. Western Investment Company*, 221 U. S. 286. Section 22 of the Act of April 26, removing restrictions against mixed-blood heirs and authorizing full-blood heirs to convey with the approval of the Secretary of the Interior, is as follows:

Sec. 22. "That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which

he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.*"

Section 20 of the Act of April 26, 1906, is the only provision pertaining to leases, and applies only to *full-blood allottees*. Section 20 is as follows:

"That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of *full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and *subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; Provided, That allotments* of minors and incompetents may be rented or leased under order of the proper court: *Provided further, That all leases* entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

In *Morrison v. Burnette*, 154 Fed. 618, the Court of Appeals held that oil and gas leases on allotments of minors were valid when approved by the proper court—and that such leases were not subject to the approval of the Secretary. The United States never contested that decision and the Interior Department adopted it as sound law.

The restrictions imposed by the various agreements with the tribes, were as to mixed-blood *allottees* left intact and unchanged by the Act of April 26, 1906. Thus, for instance, in the Creek Nation a mixed-blood Indian allottee remains under the restrictions imposed by Section 16 of the Supplemental Creek Agreement which expired August 8, 1907 (see *United States v. Bartlett*, 235 U. S. 72).

Status With Respect to Leasing for Oil Purposes Under Act of April 26, 1906.

Seminoles:

Just what effect the Act of April 26, 1906, Section 20 thereof, had with respect to oil and gas leases is a question, the Seminole Agreement approved by the Act of Congress of July 1, 1898 (35 Stat. L. 567), having reserved to the tribe at least a qualified ownership and interest in the oil and other minerals. At any rate mixed-blood Seminoles were not affected by the Act of April 26, 1906, and it is clear that a Seminole mixed-blood could not, after the Act of April 26, 1906, lease his allotment for oil and gas or mineral purposes, that power being reserved to

the tribal government with the consent of the allottee and the Secretary of the Interior. Such leases had to be made by the tribal government with the consent of the allottee, and approved by the Secretary of the Interior.

Choctaw-Chickasaw:

The Choctaw-Chickasaw Supplemental Agreement of 1902 contains no provision for leasing by the allottee or his heirs for agricultural or mineral purposes, and under Sections 12, 13, 15 and 16, neither the Choctaw-Chickasaw allottee, nor his heirs, could sell or convey or lease the allotment during the period limited, with or without the approval of the Secretary of the Interior.

While Section 13 of the Curtis Bill approved June 28, 1898, empowered the Secretary of the Interior to lease the Choctaw-Chickasaw tribal lands for oil, coal, asphalt, and other mineral purposes, that authority was evidently abrogated by Section 58 of the Supplemental Choctaw-Chickasaw Agreement of 1902, which declared that, "All coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands." The only thing found in either the Atoka Agreement, approved by the Curtis Bill of June 28, 1898, or the Supplemental Choctaw-Chickasaw Agreement of 1902, is the provision in the Atoka Agreement that, "No *allottee* shall lease

his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States Court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder, and no such lease or any sale shall be valid as against the *allottee* unless providing to him a reasonable compensation for the lands sold or leased." If that authority to lease was not repealed by the restrictions imposed by Sections 12, 13, 15 and 16 of the Choctaw-Chickasaw Supplemental Agreement, then Choctaw-Chickasaw allottees, irrespective of blood, could lease their allotments for oil and gas purposes for a period as long as five years, without the approval of the Secretary of the Interior.

Cherokees:

Mixed-blood Cherokee allottees were still under the leasing restrictions imposed by Section 72 of the Seminole Agreement. Mixed-blood Cherokee heirs were freed by Section 22 of the Act of April 26, 1906, from all restrictions against selling or leasing for oil and gas purposes.

Creeks:

The same is true with respect to *mixed-blood Creek allottees*. They were still under the restric-

tions imposed against leasing by Section 17 of the Supplemental Creek Agreement, heretofore quoted on page 17 of this brief, but mixed-blood Creek heirs were freed by Section 22 of the Act of April 26, 1906, from all restrictions against selling or leasing for mineral purposes, the inherited allotment.

C.

Insofar as full - blood allottees and full - blood heirs are concerned, the Act of April 26, 1906, superseded, comprehensively, all the prior agreements and laws imposing restrictions against alienation and the prior modifications thereof, allowing leasing for limited periods.

This was held in *Tiger v. Western Investment Company*, 221 U. S. 286, and we may pass that as settled.

D.

Section 20 of the Act of April 26, 1906, pertaining to leasing, applies only to full-blood allottees—is personal to the allottee—not affecting the full or mixed-blood heirs, and is in effect a proviso to Section 19 of the same act, which latter section deals only with the full-blood ALLOTTEE, prohibiting alienation by HIM (but not his heirs) for 25 years from the passage of the act unless Congress (not the Secretary) removes the restrictions in the meanwhile.

E.

But Section 22 of the Act of April 26 prohibited

full-blood heirs from conveying by deed or lease without the approval of the Secretary of the Interior.

It is clear that Section 20 of the Act of April 26 applies only to full-blood allottees. That section expressly says, "That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of *full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval." Section 20 is a proviso to Section 19. Section 19 dealt exclusively with full-blood *allottees* and not with inherited lands. The restrictions imposed by Section 19 absolutely prohibited any kind of alienation, by deed, lease, mortgage or otherwise, for a period of 25 years "unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress." Under Section 19 the Secretary had no power to remove restrictions or approve conveyances or any kind of alienation—the Secretary could not approve an oil and gas lease or any other kind of lease. Section 19 was absolute and prohibited any species of alienation. Such being the effect of Section 19, it was deemed wise to modify the restrictions imposed by Section 19, and consequently Section 20 was inserted, enabling *allottees* to lease. The restrictions imposed by Section 19 and modified and prescribed by

Section 20 were personal to the allottee and did not run with the land, and had no operation beyond the death of the allottee. They were personal to the allottee, like the disability of minority, disability of coverture, or the disability of a *non compos mentis*.

—*Clark v. Lord*, 20 Kan. 390;
McMahon v. Welsh, 11 Kan. 280;
Oliver v. Forbes, 17 Kan. 128;
Hancock v. Mutual Trust Co., 24 Okla. 391;
Frederick v. Gray, 12 Kan. 518.

No reference is made in Section 20 to mineral leases—simply the general term “all leases,” and of course that includes oil and gas and other mineral leases. Now if the Act of April 21, 1904, removing “All the restrictions upon the alienation of lands of all allottees * * * who are not of Indian blood, except minors, etc.,” operated to remove restrictions against leasing for oil and gas purposes, as finally conceded by the Interior Department, and as held by the State Supreme Court in *Eldred v. Okmulgee Loan & Trust Company*, 22 Okla. 742, *Sharp v. Lancaster*, 23 Okla. 349, and by the United States Circuit Court in *Moore v. Sawyer*, 167 Fed. 826, it seems clear that a like construction must be given to Section 22 of the Act of April 26, 1906, insofar as mixed-blood Indian heirs are concerned. In fact no one has ever contended otherwise. The Interior Department has never contended that a mixed-blood Indian heir, after the Act of April 26, 1906, was under any restrictions against leasing the inherited allotment for oil and gas or any other purposes.

Further, as Section 20, dealing with leasing, was personal to the ALLOTTEE, it is clear that the only restrictions against a full-blood Indian heir leasing for oil purposes after the Act of April 26, 1906, are those contained in Section 22, the last paragraph of which is "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Under that proviso a full-blood Indian heir could not lease his inherited allotment for oil and gas purposes without the Secretary's approval. If an oil and gas mining lease is an alienation, within the meaning of the statute removing all restrictions against alienation, it is certainly within the restriction against all *conveyances*, without the Secretary's approval. We will show later on that an oil and gas mining lease is a conveyance. The Act of April 26, 1906, did not deal with allottees not of Indian blood nor non-Indian blood heirs, unless non-Indian blood heirs happened, *by chance*, to inherit a restricted Indian allotment. Of course under Section 22 of the Act, non-Indian blood heirs, as well as mixed-blood heirs were empowered to convey inherited allotments without regard to the blood of the allottee. Neither did the Act of April 26 undertake to deal with mixed-blood *allottees*. The Act of April 26, however, is general as to full-bloods—full-blood allottees and full-blood heirs—and applied to all the

tribes, and unless the proviso to Section 22 thereof prohibited full-blood heirs from leasing an inherited allotment without the Secretary's approval, then full-blood heirs were either free to lease without the Secretary's approval or left in the same status given them by the various agreements—*i. e.*, the full-blood heirs' status as to leasing remained, like the status of mixed-blood *allottees*—fixed by the various agreements and unchanged by the Act of April 26, 1906. Section 20 had no application to full-blood heirs. Section 20 only applied to "full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes." The language of Section 20 is clear. It says, "That after the approval of this act all leases and rental contracts (except certain class of leases) of full-blood *allottees*," etc. What leases? Leases "of full-blood *allottees*." So far as full-blood allottees and full-blood heirs are concerned, Congress intended to fix their status by the Act of 1906, both with respect to selling and conveying their own allotments and their inherited allotments, as well as leasing the same. Congress intended that the Act of 1906 should supersede all the prior laws in regard to the alienation and leasing of lands by full blood allottees, as well as full-blood heirs. Section 20 should be construed in connection with, and as a proviso to Section 19, which is as follows:

Sec. 19. "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of

the lands *allotted to him* for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided however*, That *such full-blood Indians* of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinbefore provided; and every deed executed before, or after the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void: *Provided, further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 19 applies only to full-blood *allottees*, and unless some provision had been made for leasing, full-blood allottees would have been powerless to lease their allotments at any time within twenty-five years after the passage and approval of the act. The restriction in Section 19, "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress," operated to prohibit leasing for any purpose, and especially for oil and gas or mineral purposes. In order to prohibit the allottee from leasing it was unnecessary for the prior agreements or acts or Section 19 of the Act of April 26th, 1906, to make any reference to leasing. The broad restriction against alienation included within its scope a prohibition against leasing. This was expressly held by the United States Circuit Court of Appeals for the Eighth Circuit in *Beck v. Flourney Live Stock & Real Estate Co.*, 65 Fed. 30. See also:

United States v. Flourney Live Stock & Real Estate Co., 69 Fed. 886;

United States v. Flourney Live Stock & Real Estate Co., 71 Fed. 576.

The broad restriction against alienation included within its scope a restriction against devising the allotment by will. *Taylor v. Parker*, 235 U. S. 42.

We have already shown that the restrictions in state constitutions against alienating the family homestead without the joint consent of husband and wife renders an oil lease void unless executed by husband and wife. (See authorities on pages 27-28 of this brief.)

As Section 19 imposed restrictions against the full-blood *allottees* for 25 years, it was necessary to make some provision whereby "*full-blood allottees*" could lease their allotments during the twenty-five-year period of restrictions. Thus, Section 20 is really a proviso to Section 19, and is a limitation or modification of the restrictions imposed by Section 19. Neither Section 19 nor Section 20 makes any reference to full-blood *heirs*, and as Section 19 imposed no restrictions against full-blood heirs, it can hardly be said that Section 20, as a proviso to Section 19, modified restrictions against full-blood heirs. Thus, it appears that Section 22 is the only section applying to full-blood heirs. By virtue of Section 22 a full-blood heir not only had authority to *convey* the inherited allotment in fee, with the approval of the Secretary of the Interior, but had authority to lease the same for mineral purposes, or any other purpose, with the approval of the Secretary of the Interior.

The authority to convey with the approval of the Secretary of the Interior undoubtedly included the authority to lease for mineral purposes with the approval of the Secretary of the Interior. Unless

the authority to lease for mineral purposes, subject to the approval of the Secretary of the Interior, was conferred upon full-blood heirs by Section 22, then full-blood heirs either had no authority under the Act of April 26 and from its approval, to lease inherited lands for oil and gas purposes, or any other purposes, or the full-blood heirs with respect to leasing were left under the provisions of the various agreements with the respective tribes. It was clearly the purpose of Congress to fully legislate in Section 22 with respect to the full-blood heirs, both as to conveying and as to leasing. Otherwise, as we have shown, if full-blood heirs, with regard to leasing, remained in the status fixed by the various agreements, then they could not lease with or without the Secretary's approval in the Seminole Nation, or in the Choctaw-Chickasaw Nations, and probably not in the Creek or Cherokee Nations. It can not be contended that full-blood heirs had any authority to lease for mineral purposes under the Seminole Agreement or the Choctaw-Chickasaw Supplemental Agreement. If Section 17 of the Supplemental Creek Agreement and Section 72 of the Cherokee Agreement, providing for leasing, can possibly be construed as authorizing leases by heirs, nevertheless, the heirs had absolutely no authority to lease for mineral purposes in the Choctaw and Chickasaw Nations, or in the Seminole Nation. Evidently Congress did not intend to overlook in the Act of April 26, 1906, that situation. We think Sec. 22 covered leasing and required the Secretary's approval.

As held in *Tiger v. Western Investment Company*, 221 U. S. 286, Congress intended by that act to repeal all former restrictions against full-blood allottees and full-blood heirs and substitute therefor the restrictions imposed against the full-blood allottee by Section 19, as modified, with respect to leasing by Section 20, and repeal all restrictions imposed upon heirs by the various agreements, and substitute therefor the restrictions imposed by Section 22 against conveying by full-blood heirs.

F.

Under Section 9 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), the court having jurisdiction of the settlement of the estate of the deceased allottee acquired exclusive jurisdiction to approve any kind of conveyances including oil and gas mining leases executed by the full-blood Indian heirs. The County Court was substituted for the Secretary of the Interior as the proper Federal agency.

Section 9 of the Act of May 27, 1908, is as follows:

“That the death of any *allottee* of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That *no conveyance of any interest of any full-blood Indian heir* in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased *allottee*: *Provided further*, That *if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving*

issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

G.

Section 9 of the Act of May 27, 1908, is a substitute for section 22 of the Act of April 26, 1906, and vested in the proper County Courts all the jurisdiction formerly possessed by the Secretary under the prior act.

Except for the proviso to Section 22 of the Act of April 26, 1906, requiring "all conveyances made * * * by heirs who are full-blood Indians" to be approved by the Secretary of the Interior, full-blood Indian heirs as well as mixed-blood heirs, would have been entirely discharged from all restrictions of ev-

ery kind or character, including restrictions against leases. In *Tiger v. Western Investment Company*, 221 U. S. 286, this court had under consideration Section 22 of the Act of 1906, and on page 307 said:

“Coming now to Section 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the *statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs of any deceased Indian, etc.,* but the last sentence of the section requires the conveyance made under this provision, that is, *conveyances made by adult heirs of the character named in the first part of the section, when full-blood Indians,* to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act, and gives due effect to all the parts of Section 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in Section 16 of the Act of 1902, and this, we think, was the purpose of Congress, which is emphasized in Section 29 of the act wherein all previous inconsistent acts, and parts of acts, are repealed.” (Italics ours.)

If, as heretofore shown, general restrictions against alienation include a prohibition against leasing without any reference to leasing (*Barnes v. Stonebraker*, 28 Okla. 75; *Beck v. Flournoy Live Stock and Real Estate Co.*, 65 Fed. 30; *United States*

v. Flournoy Live Stock and Real Estate Company, 69 Fed. 886; *United States v. Flournoy Live Stock and Real Estate Co.*, 71 Fed. 576; *Taylor v. Parker*, 235 U. S. 42; *Coughlin v. Coughlin*, 26 Kan. 116; *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 43 Kan. 518; *Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311, 59 Pac. 640; *McKinnis v. Mortgage Company*, 55 Kan. 259; *Brewster v. Madden*, 15 Kan. 195; *Carter Oil Company v. Popp*, .. Okla. ...; *Francen v. Oklahoma Star Oil Company*, (not yet officially reported) 13 Okla. App. Court Rep. 313, ... Pac. ...; *Southern Oil Co. v. Colquitt*, 69 S. W. 169; *Houston & T. C. Co. v. Cluck*, 72 S. W. 83; *Mailhot v. Turner*, 157 Mich. 167, 133 Am. St. Rep. 333; *Maatta v. Kippola*, 102 Mich. 116, 60 N. W. 300; *Pritchett v. Davis*, 101 Ga. 236, 65 Am. St. Rep. 298), and if a subsequent act in such general language as that of the Indian Appropriation Act of April 21, 1904 (33 Stat. L. 189), declaring that, "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed," operates to repeal special provisions governing leasing for oil and gas purposes, as conceded by the Interior Department (*Eldred v. Okmulgee Loan & Trust Co.*, 22 Okla. 742; *Sharp v. Lancaster*, 23 Okla. 349; *Moore v. Sawyer*, 167 Fed. 826), then it clearly appears that Section 22 of the Act of April 26, 1906, abolished all restrictions against selling, conveying, encumbering and leasing by heirs other than full-blood heirs. Thus

undoubtedly the proviso to Section 22 of the Act of 1906 requiring "all conveyances made * * * by heirs who are full-blood Indians" to be approved by the Secretary of the Interior, included within that restriction a prohibition against full-blood heirs leasing for oil and gas mining purposes without the Secretary's approval. This was evidently the construction of the Interior Department, for on July 7, 1906, the Secretary prescribed his first rules and regulations under the Act of April 26, 1906. In the printed rules and regulations that he prescribed, the Secretary copied at length Sections 19, 20 and 22 of the Act of April 26, 1906. The Secretary's rules of July 7, 1906, are entitled, "LEASING AND SALE OF LANDS ALLOTTED TO OR INHERITED BY FULL-BLOOD INDIANS OF THE FIVE CIVILIZED TRIBES," and the premise and the first and second sections thereof are as follows:

"The following regulations are hereby prescribed for the purpose of carrying into effect the provisions of Sections 19, 20 and 22 of the Act of Congress approved April 26, 1906 (Public, No. 129), relative to the leasing and sale of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes, said sections being as follows (here follows in full a copy of Sections 19, 20 and 22 of the Act of April 26, 1906):

LEASES.

"*Sec. 1.* Full-blood Indian *allottees* of the Five Civilized Tribes may, subject to the approval of the Secretary of the Interior, lease

their homesteads for agricultural purposes in case of their inability on account of infirmity or age to work or farm the same, and where leases are submitted for approval covering homestead lands, the affidavit of a physician, or other satisfactory evidence, must be furnished showing the inability of the allottee to work or farm his homestead and the reason therefor. In each case, before forwarding such lease to the Department of the Interior, it shall be the duty of the United States Indian agent at Union Agency, Muscogee, Ind. T., or such other officer as may be designated for the purpose, to make a full investigation to ascertain whether the *allottee* comes within the purview of the law, whether it will be for his best interest to lease his homestead, and whether the consideration named in the lease is a fair one. He shall also ascertain the character and responsibility of the proposed lessee. In reporting he shall furnish the information herein called for, together with such other information material to the matter in hand as he may obtain, to the Secretary of the Interior and furnish his recommendation, together with his reasons therefor, as to whether the lease should be approved.

"All leases for mineral purposes covering the homestead, surplus and *inherited lands of full-blood Indians of the Five Civilized Tribes*, all leases for agricultural purposes for periods in excess of one year covering such lands, and all leases for agricultural purposes for one year or less affecting the homesteads of such Indians must be made in accordance with these regulations and approved by the Secretary of the Interior, but leases covering homesteads must not include other lands."

Sec. 2. "No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, five years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee, and one to the lessor."

The remaining 28 sections pertaining to leasing for mineral purposes go on to elaborate the kind of lease, designating the terms, stating the royalty, that the leases shall be in quadruplicate parts and how they shall be filed, bond being required, and many other details.

In other words, the provision in Section 22 of the Act of 1906 requiring all conveyances made by full-blood heirs to be approved by the Secretary of the Interior was a general restriction and this theory is borne out by Section 23 of the Act of 1906, which requires wills by full-blood allottees and full-blood heirs, disinheriting the parent, wife, spouse or children, to be acknowledged before and approved by a Judge of the United States Court or a United States Commissioner. But for the provisions of Section 23, the Secretary's approval of a will by a full-blood heir, devising the inherited allotment, would be required. Likewise, but for the proviso to Section 9 of the Act of May 27, 1908, providing, "That no conveyance of *any interest* of any full-blood Indian heir in such land shall be valid unless approved by the

court having jurisdiction of the settlement of the estate of said deceased allottee," all heirs, irrespective of their degree of Indian blood, would have been completely emancipated and discharged of all restrictions of every kind and character, both as to selling and leasing imposed by prior laws. That is too plain for argument. We think this court in *Tiger v. Western Investment Company*, 221 U. S. 286, in the remarks found on page 309, clearly sustains our contention that Section 9 of the Act of 1908 is a substitute for Section 22 of the Act of 1906. Thus, Mr. Justice DAY said:

"Section 9 of that act provides: '*Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,*' etc. (35 Stat. 312.)

"The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court."

As suggested, Sections 22 and 23 of the Act of 1906 are the only provisions therein pertaining to full-blood heirs, and under those sections, the full-blood heir could neither deed his land, convey it in any way, nor lease it without the approval of the

Secretary, nor could he devise it by will so as to disinherit the parent, wife, spouse or children unless the will was approved by a Judge of the United States Court or a United States Commissioner. Section 8 of the Act of 1908 enables a full-blood heir to make such a will mentioned in Section 23 of the Act of 1906, by acknowledging the same before, and obtaining the approval of a judge of a County Court of the State of Oklahoma.

We contend that Section 9 and Section 8 of the Act of 1908 contain all the legislation on the question of conveyances or leases or wills by full-blood Indian heirs. The language of section 9 "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land," is broad and swept aside all restrictions of every kind or character—abrogated all prior restrictions—with the exception "that no conveyance of *any interest* of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." An oil and gas mining lease is a conveyance of an interest within the meaning of Section 9, and was so held by the Oklahoma Supreme Court in *Hoyt v. Fixico*, 71 Okla. . . ., 175 Pac. 517. All such leases have been universally submitted to the County Court having jurisdiction. While an oil and gas mining lease is not a conveyance of the oil and gas in place, "it is a grant * * * to such part thereof as the grantee may find."

An oil and gas mining lease for a *definite term of years, without* any provision for it to run as long as oil or gas is found in paying quantities, is a chattel real.

—*Duff v. Keaton*, 33 Okla. 92;
Tupeker v. Deaner, . . Okla. . . ., 148 Pac.
853.

Such a lease grants an incorporeal hereditament.

—*Kolachny v. Galbreath*, 26 Okla. 772, 110
Pac. 902;
*Frank Oil Company v. Belleview Gas & Oil
Co.*, 29 Okla. 719;
Priddy v. Thompson, 204 Fed. 955;
Kemmerer v. Midland Oil & Drilling Co.,
229 Fed. 872.

An oil and gas lease for a definite number of years and to run *thereafter as long as oil or gas is found in paying quantities*, being for an indeterminate period of time, creates a freehold estate: *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9; *Guffey v. Smith*, 237 U. S. 101, 116; Washburn on Real Property, 6th ed., section 124, section 336 and section 383; *Effinger v. Lewis*, 32 Penn. 367; *Beeson v. Burton*, (Eng.) 12 C. B. 647; *In re King's Freehold Estate*, (Eng.) L. R. 16 Eq. 521; *Zimble v. Abrahams*, (1903) 1 K. B. 577; *People v. Bell*, 237 Ill. 332, 86 N. E. 593; Greenleaf's Cruise on Real Property, Vol. 1, Sec. 14, page 45.

Thornton on Oil and Gas, Section 51, says:

“Whatever rights an operator receives, unless he operates under a parol license, he re-

ceives *by virtue of the written instrument* under which he operates, and to that instrument we must look to determine what legal *interest he has in the premises*. But restricting ourselves to a lease, as such purely, the question arises, 'What interest has the lessee in the leased premises?' In the case of an agricultural lease, or the lease of a house or building, for a term of years, the interest of the lessee is easily defined by means of the decisions of the courts running back many hundreds of years. But in the case of an oil or gas lease, where the length of the term is contingent on the discovery of gas or oil in paying quantities, and on its continuance in such quantities, although limited to a specified number of years, with a right to take and carry away a part of the oil itself, a very different question is presented. The interest of a lessee under such a lease has been termed a chattel real, and not a partnership asset. 'The contract referred to was a lease on the land for a specified term,' said the Supreme Court of Pennsylvania, 'and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of the writing there can, we think, be no doubt; *it conveyed an interest in the land*; in this respect it is distinguished from a license.' 'But although the writing is a lease, it conveyed an interest in the land—a chattel interest, however; the lease was a chattel real, but none the less a chattel.' Such an interest may be sold on execution, the purchaser being regarded as an assignee. If the lessee mortgage his interest, the mortgage must be executed in accordance with the law relating to a chattel mortgage."

It is said that ejectment does not lie in favor of the lessee and that consequently an oil lease is a

mere "illimitable vista of hope." Until development an oil and gas lease is an incorporeal hereditament, but an incorporeal hereditament is land or an interest in it. An incorporeal hereditament at common law can only be created by grant because it is incapable of livery of seizin; Jones' Blackstone, Edition De Luxe, Book 3, Sec. 268, and Book 2, Sec. 434; Washburn on Real Property, 6th Ed., Vol. 3, Sec. 2233; *Beatty v. Gregory*, 17 Iowa 116; *Heller v. Daley*, 63 N. E. 494; *Harlow v. Lake Superior Iron Company*, 36 Mich. 119.

Because an oil and gas lease conveys an interest in land it is within the statute of frauds.

- White v. Green*, (Kan.) 173 Pac. 974;
- Robinson v. Smalley*, (Kan.) 171 Pac. 1155;
- Love v. Kirkbride Drilling Co.*, 37 Okla. 804;
- Bentley v. Zelma Oil Company*, 76 Okla. 116, 184 Pac. 141;
- Riddle v. Brown*, 20 Ala. 412;
- Hicks v. Swift*, 133 Ala. 411, 31 South. 947;
- Brown on Statutes of Frauds*, Sec. 231;
- Brown v. Brown*, 33 N. J. Eq. 650;
- Barnes v. Boston & Maine R. R.*, 130 Mass. 338;
- Thornton on Oil & Gas*, Section 94;
- Lithgow v.*, 39 Ohio Wkly. L.

We do not care whether an oil lease is an incorporeal hereditament or a chattel real, or a free-hold estate—it conveys to the lessee the *right* to enter upon the land and extract therefrom the minerals and that right to enter, occupy, and operate for min-

erals is equivalent to all the owner of the fee possesses. The owner of the land has no unqualified ownership in the oil and gas. Oil and gas being migratory and fugitive, this court said in *Ohio Oil Company v. Indiana*, 177 U. S. 190, 44 L. ed. 729, that the owner of the land himself had nothing more than the vested right to drill a hole in the land and take what oil and gas he could find. If an oil lessee has not an interest in the land, what has he? If he has a right to enter, occupy and operate and appropriate the oil and gas, he has a right that is equivalent to a deed, because he has everything the owner of the land can possibly grant or convey.

In *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 580, this court said a conveyance of the rents and profits is a conveyance of the land and quoted Coke:

“ ‘For what is the land but the profits thereof?’ Co. Lit. 45. And that a devise of the rents and profits or of the income of land passes the land itself both at law and in equity. 1 Jarm. Wills, (5th ed.) 798, and cases cited.”

In *State v. Cowan*, 35 Atl. 359, the court cites a number of authorities and says: “Thus a grant of the rents and profits of a tract of land is the grant of the land itself.” Why is this principle not equally true of an oil lease? It is the equivalent of a grant of the oil itself.

In *Brewster v. Lanyon Zinc Company*, 140 Fed. 801, Mr. Justice VAN DEVANTER, then on the Circuit bench, said this in regard to an oil lease:

“Although the parties, with the sanction of a general practice, denominated the instrument a ‘lease,’ strictly speaking it was not such, but was more *in the nature of a grant in presenti of all the oil and gas in the lands described*—these minerals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. *Lanyon Zinc Co. v. Freeman*, (Kan.) 75 Pac. 995; *Dickey v. Coffeyville Vitrified Brick & Tile Co.*, (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors and assigns, is without limitation as to time, and plainly shows that it is designed to be perpetual, if the oil or gas shall continue, and the lessee and those claiming under it shall fulfill its stipulations. True, it was made and accepted upon certain conditions, one of which is that the premises may be reconveyed at any time at the option of the lessee; that that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other. *That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term.* Archbold’s Landlord and Tenant, 92; *Dann v. Spurrer*, 3 Bos. & Pul. 399; *Doe v. Dixon*, 9 East. 15. The present lease is of this type. It is essentially one in perpetuity.”

In *Aggers v. Shaffer*, 256 Fed. 648, the Court of Appeals held that an Oklahoma oil and gas lease was not a mere chose in action, and that the non-resident

assignee or the resident assignor could maintain a suit in the Federal Court under the diverse citizenship section of the Judicial Code. The court held that such lease granted a present vested interest in the land, and among other things, said:

“The appellant contends that the trial court did not have jurisdiction of the suit. The ground of jurisdiction was diversity of citizenship, and such diversity existed between the plaintiff, on the one side, and the defendants, including the appellant, on the other. But it is urged that plaintiff's suit was for the specific performance of an optional unilateral contract, was therefore to recover upon a chose in action within the meaning of Section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. L. 1091, Comp. St. Sec. 991), and since the citizenship of plaintiff's assignor was not disclosed, the jurisdiction of the court below did not appear. It is enough to say of this that by the law of Oklahoma, where the land is, a lease like that held by plaintiff grants a present vested interest in the premises (*Northwestern Oil & Gas Co. v. Branine*, 175 Pac. 533; *Rich v. Doneghey*, 177 Pac. 86), and that the right he sought to protect and enforce is not a chose in action within the meaning of Section 24 of the Judicial Code. The citizenship of plaintiff's assignor was therefore immaterial. The authority of *Brown v. Wilson*, 160 Pac. 94, L. R. A. 1917-B, 1184, relied on for a contrary conclusion, is destroyed by the later cases above cited.

“Upon the nature of such leases, see *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. ed. 856, held in the *Rich* case, *supra*, to be substantially in accord with the rule in Okla-

homa; also Kemmerer v. Midland Oil & Drilling Co., 144 C. C. A. 154, 229 Fed. 872."

In the recent case of *Rich v. Doneghey*, 71 Okla. ..., 177 Pac. 89, the court followed the rule announced by Justice VAN DEVANTER in *Brewster v. Lanyon Zinc Company*, *supra*, and discussing the question at length, said:

"At the time of its execution the plaintiffs were the owners in fee simple of the land. By virtue of such ownership they had, on account of the 'vagrant and fugitive nature' of the substances constituting 'a sort of *subterranean feræ naturæ*' (*In re Indian Territory Ill. Oil Co.*, 43 Okla. 307, 142 Pac. 997), no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of forming a part of, the soil itself. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729.

"But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of their land, and explore therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby. *This right is the proper subject of sale, and may be granted or reserved. Barker v. Campbell-Ratcliff Land Co. et al.*, 167 Pac. 468, L. R. A. 1918-A, 487. The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more spe-

eifically, as designated in the ancient French, a profit *a prendre*, analogous to a profit to hunt and fish on the land of another. *Kolachny v. Galbreath*, 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; *Funk v. Haldeman et al.*, 53 Pa. 229; *Phillips v. Springfield Crude Oil Co.*, 76 Kan. 783, 92 Pac. 1119. *Considered with respect to duration, if the grant be to one and his heirs and assigns forever, it is of an interest in fee. Funk v. Haldeman, supra. An interest of less duration may be granted, and that for a term of years has been denominated by this court a chattel real. Duff v. Keaton*, 33 Okla. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472. *Such right is an interest in land. 14 Cyc 1144; Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490. If granted in the homestead of the family, the wife must join in the conveyance. *Carter Oil Co. v. Popp*, 174 Pac. 747.

"A grant thereof is an alienation within the meaning of the Acts of Congress removing restrictions (*Eldred v. Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929), or imposing restrictions (*Parker v. Riley*, 243 Fed. 42, 155 C. C. A. 572), on the alienation of allotted Indian land, and is a conveyance within the meaning of Section 9, Act Cong. May 27, 1908, c. 199 (35 Stat. L. 315), providing that 'no conveyance of any interest of any full-blood Indian heir' in land inherited from any deceased allottee of the Five Civilized Tribes, shall be valid unless approved by the County Court. *Hoyt v. Fixico*, 175 Pac. 517 (decided Oct. 8, 1918).

"Bearing these principles in mind, it will at once be seen that by this instrument the plaintiffs granted to the defendant a present vested interest in their land. *Brennan v. Hunter*, 172

Pac. 49; *Northwestern Oil & Gas Co. v. Branine*, 175 Pac. 533 (decided Oct. 8, 1918). That is, the right for at least five years of mining and operating thereon for oil and gas, which includes, of course, the right to explore therefor, and to extract therefrom and reduce to possession, as their personal property, such as may be found. In other words, it was a grant of the exclusive right, for the time specified, to take all the oil and gas that could be found by drilling wells upon the particular tract of land, with the accompanying incidental right to occupy so much of the surface as required to do those things necessary to the discovery of and for the enjoyment of the principal right so to take oil or gas. *No more nor greater right, except perhaps as to duration, with respect to oil and gas, could be granted.* Although there had been in terms a purported conveyance of all the oil and gas in the place, yet, by reason of the nature of these substances, no title thereto or estate therein would have vested, but only the right to search for and reduce to possession such as might be found; and when reduced to possession, not merely discovered, title thereto and an estate therein as corporeal property would vest. *Kolachny v. Galbreath*, *supra*; *Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okla. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; *Hill Oil & Gas Co. v. White*, 53 Okla. 748, 157 Pac. 710. Though denominated a lease, and in deference to custom will be so referred to herein, the instrument before us, strictly speaking, is not such, *but is in effect a grant in presenti of all the right to the oil and gas to be found in the lands described, with the right for a term of five years to enter and search therefor, and, if found, to produce and remove them, not only during said term, but*

also as long thereafter as either is produced, and to occupy so much of the surface of the land as may be necessary for the purpose of exploration or production, or both."

See also, *Guffey v. Smith*, 237 U. S. 112-113; *Barnsdall v. Bradford Gas Company*, (Pa.) 74 Atl. 207.

A Full-blood Heir's Deed to the Oil and Gas or Other Minerals.

At this late day, after a lapse of many years, it is contended that Section 2 of the Act of May 27, 1908, must be considered as a proviso to Section 9 and a limitation upon the power of the County Courts. Section 2 is as follows:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further*, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include

all males under the age of twenty-one years and all females under the age of eighteen years."

The first sentence in Section 2 clearly applies only to allottees—to leases by allottees if an adult, or by the guardian or curator of a minor or incompetent allottee. The proviso to Section 2 providing "that leases of restricted lands for oil, gas or other mineral purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior * * * and not otherwise," is not a proviso to Section 9. Strange to say that if it was intended by Congress to engraft the proviso to Section 2 on to Section 9 as a limitation on the power of the County Courts, Congress did not plainly say so. Thus, in *United States v. First National Bank*, 234 U. S. 261, Mr. Justice DAY said:

"The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear, that is, *we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended it would have been easy for the legislative body to have expressed it in apt terms.* *Farrington v. Tennessee*, 95 U. S. 679, 689; *Bank v. Matthews*, 98 U. S. 621; *Tompkins v. Little Rock & Ft. S. R. Co.*, 125 U. S. 109, 127; *United States v. Lexington Mill Co.*, 232 U. S. 399, 410." (Italics ours.)

It is not the construction readily suggesting itself to the mind of any reader, and the fact that the Department did not so contend for many years is strong evidence that the construction now insisted upon is wrong.

Circuit Judge THAYER of the Eighth Circuit, one of the ablest judges ever adorned the bench in this country, said in *Ardmore Coal Company v. Bevil*, 61 Fed. 757, that, "*It is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey.*" It is conceded that a full-blood heir may convey the fee, or a life estate, or an undivided interest in an inherited allotment with the approval of the County Court, but it is contended that a full-blood heir's inheritance is *restricted land*. We concede that it is restricted land in the sense that he can not convey it without the approval of a federal agency—the County Court—but it is not "restricted land" within the meaning of the proviso to Section 2 of the Act of 1908, and we are confident that this court never intended in *Richard v. Parker*, 250 U. S. 235, to commit itself to any such broad holding. We will discuss that case later on. Now, it being conceded, as it must be, that a full-blood heir can convey his inherited allotment in fee, or convey an undivided interest therein, or a life estate therein with the approval of the County Court, it must likewise be

conceded that such full-blood heir, with the approval of the County Court, can convey all the oil and gas in the land, or the coal in the land, or any other mineral, or may convey all the mineral. The full-blood heir, with the approval of the County Court, and without the consent of the Secretary can make a deed—a valid deed—disposing of all the oil and gas in the inherited allotment, or all the coal or other mineral. Every court passing on the question has held that the owner of land can convey by deed all the oil and gas, or all the coal or other mineral substances. That the owner of the land, although he has no unqualified ownership in the oil and gas in place because of its volatile character, can sell and convey the oil and gas by deed, is well settled.

—*Strother v. Mangham*, 138 La. . . , 70 So. 426;

Texas Co. v. Daugherty, (Tex.) 176 S. W. 717;

Mound City Brick & Gas Company v. Goodspeed Gas & Oil-Co., (Kan.) 109 Pac. 1002;

Feather v. Baird, (W. Va.) 102 S. E. 294;

Northcut v. Church, (Tenn.) 188 S. W. 220;

Snodgrass v. Koen, (W. Va.) 96 S. E. 606;

Paxton v. Benedum-Trees Oil Company, (W. Va.) 94 S. E. 472;

Hammarstedt v. Bakeley, (Iowa) 166 N. W. 729;

Ramey v. Stephney, .. Okla. . . , 173 Pac. 72;

McKinney v. Central Kentucky Natural Gas Co., 134 Ky. 239, 20 Ann. Cas. 934;

Hoilman v. Johnson, (N. C.) 80 S. E. 249.

Or, the owner of the land may sell it, excepting the oil and gas or other minerals from the conveyance, thus retaining in himself the fee simple title to the oil and gas.

- Barker v. Campbell-Ratcliff Land Co.*, ..
Okla., L. R. A. 1918-A, 487;
Ramey v. Stephney, .. Okla., 173 Pac.
72;
de Moss v. Sample, 143 La., 78 So. 482;
Preston v. White, 57 W. Va. 278, 50 S. E.
236;
Murray v. Allred, 100 Tenn. 100, 66 Am. St.
Rep. 740;
Williams v. South Penn Oil Co., 52 W. Va.
181, 60 L. R. A. 795;
Chartiers Block Coal Co. v. Mellon, 34 Am.
St. Rep. 645;
Thornton on Oil & Gas, 3rd ed., Vol 2, Sec.
919.

As a deed conveys more than a lease we would have this anomalous and absurd situation: The full-blood heir, with the approval of the County Court, can convey all the oil and gas absolutely without reserving any royalty, but he can not convey the inherited land for a term of years for oil and gas purposes, retaining a royalty, without the approval of the Secretary of the Interior.

We therefore have this conundrum: If an oil and gas lease is not a conveyance within the meaning of Section 9 of the Act of May 27, 1908, and the County Court has no jurisdiction to approve it, is a deed to the oil and gas or other minerals a lease and

therefore subject to approval by the Secretary of the Interior?

It will require some hard pulling and a tremendous amount of stretching to *reform* the Act of May 27, 1908, so as to confer jurisdiction on the Secretary to approve oil and gas, or other mineral *deeds* executed by full-blood heirs. Such construction would be indefensible judicial legislation—utterly inconceivable. If the Secretary has jurisdiction and the County Courts have none, then those who have obtained mineral leases from full-blood heirs with the approval of the County Courts, all of which reserve substantial royalties to the lessors, made a mistake—they should have obtained deeds to the oil and gas or other minerals. Lawyers and judges compose a small fraction of the population of this country and laws in general were made for laymen. Fine, etherealized points, especially when developed several years after an act of the legislature or Congress under which property rights have vested, bring the law in disrepute, and add to the ranks of those who already think laws were made for the benefit of lawyers and certain classes.

**Sections 1, 2, 3 and 9 of the Act of May 27, 1908,
Considered and Discussed.**

We have asserted that Sections 9 and 8 contain all the law pertaining to inherited lands and full-blood heirs. The second proviso to Section 9 introduces no new restriction. That proviso is as follows:

“Provided, further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions: if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.”

This proviso applies only to the homestead of allottees of “one-half or more Indian blood” and continues the restrictions imposed by Section 1 on the homesteads of citizens of one-half or more Indian blood on the contingency that such citizen, at his death “leave issue surviving born since March 4, 1906,” in which event, unless the Secretary of the Interior had removed the restrictions as authorized by Section 1, the homestead shall remain “for the use and support of such issue during their life or

lives, until April 26, 1931." Then if the allottee have no such issue he is authorized to dispose of the homestead by will, free from all restrictions.

Now, Section 1 classifies the lands and citizens with respect to restrictions against alienation. Section 1 is as follows:

"Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the

respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. * * *

It will be noted that Section 1 expressly provides that "All homesteads of said allottees enrolled as mixed-blood Indians having *half or more than half Indian blood* * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April 26, 1931, *except that the Secretary of the Interior may remove such restrictions, wholly or in part.*" So, therefore, the declaration in the second proviso to Section 9 that the homestead of an allottee of one-half or more Indian blood shall remain inalienable "*unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,*" preserves after the allottee's death the restricted status of such homesteads fixed by Section 1 on the contingency however, that such allottee of one-half or more Indian blood die leaving issue surviving born since March 4th, 1906. The degree of blood of issue born after March 4th, 1906, is *not* material. To that extent the second proviso to Section 9 qualifies the broad declaration "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land." Thus the second proviso

to Section 9 imposes no new restriction, but simply preserves the restriction imposed by Section 1 on the contingency above mentioned. We have already shown under the authorities that the broad language used in Section 1 that "*all homesteads of said allottees enrolled as mixed-blood Indians, having half or more than half Indian blood, including minors of such degree of blood * * * shall not be subject to alienation, etc., prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions,*" runs with the land, and but for Section 9 would have imposed restrictions on the heirs to the same extent that it imposed restrictions on the allottee. (*Bowling v. United States*, 233 U. S. 528; *United States v. Noble*, 237 U. S. 74; *Aaron v. United States*, 204 Fed. 943; *Reed v. Clinton*, 23 Okla. 610.) The point here suggested is this:

Section 1 is comprehensive, classifies the lands and citizens with respect to alienation, and but for the provisions of Section 2 enabling allottees to lease their restricted allotments, with the Secretary's approval, the restrictions imposed by Section 1 would disqualify the allottees falling within the restricted class from leasing their land for any term of years, or for any purpose unless the Secretary removed the restrictions. But for Section 2 the Secretary would have to remove the restrictions before the land could be leased.

Section 2 is as follows:

“That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.”

Section 2 is in the nature of a proviso to Section 1 and qualifies and modifies the restrictions imposed by Section 1. The most significant thing about Sections 2 and 9 is this: The County Court is made the federal agency to approve *all conveyances* made by full-blood Indian heirs—conveyances of *any interest*—but the very moment Section 9, the second proviso, commences to deal with the *homesteads of allottees* “of one-half or more Indian blood” restricted by Section 1 for a period extending to April 26,

1931, the Secretary must have removed the restrictions in order to relieve such restricted homestead of the restraint against alienation. In other words, Section 9 expressly defines the only land over which the Secretary of the Interior retains jurisdiction, to-wit, the homestead of a citizen "of one-half or more Indian blood," which is expressly restricted by Section 1. It is hardly necessary for us to call the court's attention to the rule of statutory construction, "That the express mention of one person, thing, or consequence is tantamount to an express exclusion of all others."

—Black on Interpretation of Laws, page 146;
Lewis' Sutherland Statutory Construction,
Vol. 2, Sec. 491.

The first sentence in Section 2 clearly applies to *allottees*—that is what it says—"That all lands other than homesteads allotted to members of the Five Civilized Tribes, from which the restrictions have not been removed, may be leased by the *allottee*, if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal." Then, the provisos, first and second, are as follows:

First Proviso:

"That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the

Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

It is now contended that the words "restricted lands" apply to any lands whose alienation is prohibited, except with the consent or approval of a federal agency and that the County Court has been designated a federal agency to approve conveyances by full-blood heirs, and that lands inherited by full-blood heirs are therefore restricted lands. Of course, they are restricted lands in the sense that they can not be alienated except by the approval of the County Court, but they are not restricted lands in the sense of the first proviso to Section 2. "*Restricted lands*," as that term is used and meant in Section 2, refers to lands made inalienable by Section 1 at any time prior to April 26, 1931, "*except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of SALE and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.*" Thus, under Section 1 the Secretary had no power to approve conveyances, or deeds, or leases of any kind or character. Under Section 19 of the Act of April 26, 1906, the full-blood allottee was restricted for 25 years, the Secretary having no authority to either remove restrictions or approve conveyances. But for the enabling provisions of Section 2 of Act of May 27, 1908, granting the right to lease, lands restricted by Section 1 can not be leased. The only way a lease could be acquired on restricted

lands under the provisions of Section 1 would be for the Secretary to remove all restrictions and allow the land to be sold. Congress deemed it wise to modify the restrictions imposed by Section 1 so as to allow leasing by the allottee, such leases however for oil and gas and mining purposes, and ordinary leases for more than five years to be made with the approval of the Secretary. Under Section 1 the Secretary had no authority to approve a lease or consent to the leasing of an allotment. Under Section 9 the jurisdiction of the County Court to approve conveyances made by full-blood heirs included authority to approve leasing. Just as obvious, the power of the Secretary under Section 22 of the Act of April 26, 1906, to approve conveyances included the power to approve leases. But under Section 1 of the Act of 1908, the Secretary had no such power—his power was confined to an actual removal of restrictions. *Instead of Section 2 operating as a restriction against leasing it operates as a modification of the restrictions contained in Section 1, the restrictions in Section 1 being modified so as to allow allottees to lease with the approval of the Secretary.* No such modification was necessary to permit full-blood heirs to lease for mineral purposes or other purposes because the County Court, under Section 9, was given authority to approve conveyances and that included, *instead of excluding*, the power to lease with the court's approval. Sections 1 and 2 thus construed is a mere continuation of the prior and established policy of Congress to first impose

absolute restrictions against alienation and then modify the restrictions so as to permit leasing. Again the question occurs:

If Congress had intended to require the Secretary's approval of oil and gas leases, or mineral leases executed by full-blood heirs, it should have been careful to so state in Section 9, especially in view of the fact that Congress, in Section 1, authorized the Secretary to remove restrictions.

Turning to the books upon statutory construction, we find that, "A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operating of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent."

—Black on Interpretation of Laws, page 270.

The same authority further says:

"The natural and appropriate office of a proviso to a statute or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence, it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope."

—Black on Interpretation of Laws, page 273.

Another eminent authority says:

"The natural and appropriate office of the

proviso being to restrain or qualify some preceding matter, it shall be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. *If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect."*

In the same section the author further says:

"The proper function of a proviso being to limit the language of, it will not be deemed intended from *doubtful* words to enlarge or extend the act or provision on which it is engrafted. Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms."

—Sutherland on Statutory Construction, Vol. 2, Sec. 352.

In delivering the opinion of the court in the case of *United States v. Dickson*, 15 Peters 141, 165, Mr. Justice STORY said:

"We are led to the general rule of law which has always prevailed, and because consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is af-

terwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions, only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

That a proviso is construed strictly and takes no case out of the enacting clause which does not clearly fall within its terms, see the following authorities:

- Ryan v. Carter*, 93 U. S. 78, 85, 23 L. ed. 808;
- United States v. Alston Newhall & Co.*, 91 Fed. 529;
- Carter v. Hobbs*, 92 Fed. 599;
- Wall v. Cox*, 101 Fed. 409;
- In re Matthews*, 109 Fed. 614;
- Boston Safe Deposit & Trust Company v. Hudson*, 68 Fed. 760;
- United States v. Schillerholz*, 137 Fed. 618;
- Gould v. New York Life Insurance Co.*, 132 Fed. 929;
- Murray v. Beal*, 97 Fed. 569;
- Paxton Lumber Co. v. Farmer's Lumber Co.*, 50 Am. St. Rep. 596.

Not only will the proviso be strictly construed but the general rule of interpretation is that a proviso must be construed with reference to the subject-matter of the *section of which it forms a part*, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

—*Boston Safe Deposit & Trust Company v. Hudson*, 68 Fed. 760;

United States v. 132 Packages of Spiritous Liquors, 65 Fed. 983;
Chattanooga R. & C. R. Co. v. Evans, 66 Fed. 814;
In re Matthews, 109 Fed. 614;
McRae v. Holcomb, 46 Ark. 306;
Bragg v. Clark, 50 Ala. 363;
Black on Interpretation of Laws, page 275;
Sutherland Statutory Construction, Vol. 2, Sec. 352.

Second Proviso:

The second proviso to Section 2 is incomprehensible on any other theory than that section 2 has no application to Section 9, and in no sense refers to mineral leases executed by full-blood heirs. The second proviso to Section 2 says: "That the jurisdiction of the probate courts of the State of Oklahoma *over lands of minors and incompetents* shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Now if Congress intended to confer jurisdiction on the Secretary of the Interior to approve mineral leases executed by full-blood heirs, why did the second proviso to Section 2 make "*the jurisdiction of the probate courts*" subject to the veto or approval of the Secretary as to oil leases only "*over lands of minors and incompetents*"? Guardians of minor full-blood heirs have made lots of oil and gas leases under the order and direction of the probate

court without it occurring to anyone that such leases were subject to the Secretary's approval. And this court recently in *Annie Harris v. Bell*, decided November 15, 1920, held that inherited lands of full-blood minors were subject to sale by the guardian under order of the proper probate court, although the proviso to the 3rd paragraph of Section 6 of the Act of May 27, 1908, says: "That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise." County Courts have not undertaken to exercise jurisdiction to sell through a guardian the *allotments* of full-blood minors restricted by Section 1 of the Act of May 27, 1908. If we be wrong, then we have this situation: A full-blood allottee can neither sell nor lease his land for certain purposes at any time before April 26, 1931, unless the Secretary removes restrictions or approves the lease, but a minor full-blood heir's inherited land may be sold or mortgaged by the guardian, under order of the proper probate court, or the adult full-blood heir can sell or mortgage his inherited land or deed the minerals therein with the approval of the County Court, but another and different agency, to-wit, the Secretary, must approve a lease executed by either the guardian or by the adult heir.

It seems to us that the second proviso to Section 2, expressly subjecting the judgment of the probate court approving a mineral lease executed by the guardian of a minor or incompetent to the Secretary's

veto or approval, without any express provision subjecting the same court's judgment approving an adult full-blood heir's mineral lease to the approval or veto of the Secretary, is conclusive that Congress did not intend to qualify the court's jurisdiction to approve conveyances by full-blood adult heirs by the requirement that mineral leases by the same heirs be approved by the Secretary. If Congress intended to qualify the jurisdiction of the County Courts, conferred upon them by Section 9, so as to require the Secretary's approval of mineral leases executed by the same heirs, it is strange Congress did not say so, especially in view of the fact that Congress did expressly make the jurisdiction of the same courts "over lands of minors and incompetents" with respect to mineral leases, subject to the Secretary's veto or approval. The maxim "expressio unius est exclusio alterius" is certainly applicable.

Parker v. Richard, 250 U. S. 235.

It is contended that this court in the above styled case, handed down June 2nd, 1919, settled this question adverse to our contention. The syllabus as prepared by the reporter is misleading. The point involved in this case was not before this court in *Parker v. Richard*, and we are not at war with that decision. The point here involved is whether or not an oil and gas mining lease executed by full-blood heirs, with the approval of the County Court, is valid without the approval of the Secretary of the Interior, and that point was not in the *Parker-Richard* case.

In *Parker v. Richard*, the guardian of a full-blood minor Creek allottee, during the lifetime of the allottee, executed an oil and gas mining lease, which, of course, under Section 2 of the Act of May 27, 1908, was subject to approval by the Secretary of the Interior. The lease was executed by the allottee's guardian under the order of the County Court, was on a Departmental form and expressly subject, according to the terms of the lease, to the Secretary's approval. The guardian's ward, being a full-blood allottee, no valid lease for oil and gas purposes could have been made without the Secretary's approval. There was no contention about the validity of the lease or the proper manner of its execution and approval by the Secretary. After the lease had been executed by the guardian of the allottee, under the order of the County Court, and after its approval by the Secretary, the allottee died and the question presented was whether or not the Interior Department lost jurisdiction over the royalties on account of the death of the allottee, the lessor. This court held that under the terms of the lease and the regulations of the Secretary prescribed under the authority of Section 2 of the Act of 1908, the Interior Department did not lose jurisdiction over the royalties. But the question as to whether or not the full-blood heirs of a deceased allottee can make an oil and gas lease without the approval of the Secretary of the Interior was not involved, and we do not think this court intended to decide that ques-

tion. The opinion in *Parker v. Richard* must be construed with reference to the circumstances of that particular case and the question actually under consideration; and the authority of that decision as a precedent is limited to the points of law which were actually raised by the record, considered by the court and *necessary* to the decision of the case. There can be no question about the jurisdiction of the Secretary to approve the lease executed by the guardian of the allottee in *Parker v. Richard*. But after the death of an allottee whether or not a full-blood heir can make an oil and gas lease with the approval of the County Court, and without the approval of the Secretary, was not involved in that case. Not being involved, *Parker v. Richard* is by no means conclusive of the question here involved.

Black on the Law of Judicial Precedents, page 49, in discussing the interpretation of judicial decision, says that the language of a judicial decision is to be construed with reference to the circumstances of the particular case, and the question actually under consideration, and that the authority of the decision as a precedent is limited to those points of law which were raised by the record and *necessary* to a determination of the case. Black says:

“This is a very fundamental principle in the theory of judicial precedents, and has been repeatedly recognized and asserted by the courts, as well as by theoretical writers. ‘A law or rule of law made by judicial decisions,’ says Austin, ‘exists nowhere in a general or abstract form.

It is implicated with the *peculiarities* of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals; and in order that its import may be correctly ascertained, the circumstances of the case to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons given for each decision must be construed and interpreted according to the *facts of the case* by which those reasons were elicited, rejecting as of no authority any general propositions which may have been stated by the judge, but were not called for by the facts of the case or necessary to the decision. The reasons when so ascertained must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct. Without this process of abstraction, no judicial decision can serve as a guide of conduct or can be applied to the solution of subsequent cases. *For as every case has features of its own*, and as every judicial decision is a decision on a specific case, a judicial decision as a whole, or as considered *in concreto*, can have no application to another and therefore a different case."

In *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice MARSHALL said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those

expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. *The question actually before the court is investigated with care and considered in its full extent.* Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Black on Judicial Precedents further says:

"It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, *and it is only authority to that extent.* The reasoning, illustrations, or references, contained in the opinion of the court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court."

In construing Section 9 of the Act of May 27, 1908, this court, in *Parker v. Richard*, said, "There is nothing in the proviso indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties.*" This court did not say that Section 9 does not indicate that it was not the intention of Congress "to commit to the court the *leasing* of full-blood heirs' inherited lands for oil and gas purposes," but says that the proviso to Section 9 does not indicate an intention upon the

part of Congress "to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties*," made by the allottee before his death. There is a vast difference between holding that the Secretary continued to have supervision over a lease executed by an *adult full-blood allottee* or the guardian of a full-blood allottee; and holding that the Secretary has authority and the County Court has none to approve a lease executed by the full blood heirs of a deceased allottee. We can best analyze and emphasize our interpretation of the opinion in *Parker v. Richard* by quoting therefrom and italicizing certain parts of the opinion. Thus the court says:

"The questions to be considered are whether the land covered by the lease is land from which restrictions on alienation have been removed, *and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of the royalties has terminated.*

"The land was part of the Creek tribal lands and was allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500, the allottee being a minor and an enrolled Indian of the full-blood. In 1912, while he was yet *a minor*, the oil and gas lease was given by his guardian, the lease being approved by the court having jurisdiction of his estate and by the Secretary of the Interior. The allottee died in 1916, while still a minor, and left his father, a full-blood Creek Indian, as his only heir. Approximately \$280,000 in royalties have accrued under the lease—part before and part

since the allottee died. These royalties have been collected by the defendants *pursuant to the terms of the lease and the regulations of the Secretary of the Interior* and are being held by them in trust under a provision in the regulations which authorizes them to retain and care for such funds 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.' The plaintiffs are the administrators of the estate of the deceased allottees."

After having thus stated the case, the court discusses the Act of May 27, 1908, as follows:

"By Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that 'all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the Interior may remove such restrictions*, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.' *There was NO SUCH REMOVAL in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.*

"By Section 2 of the same act Congress declared that 'leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the In-

terior, and not otherwise.' The lease was given *under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity.* It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, *that the royalties thereunder should be paid to his representatives,* that, with exceptions not material here, the regulations as then or thereafter in force should be *deemed part of the lease,* and that in the event restrictions on alienation should be removed the supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands."

And, discussing the effect of the Secretary's regulations lawfully prescribed whereby the Secretary retained jurisdiction over the royalties, the court further says:

"One of the regulations prescribed by the Secretary deals with the payment to lessors, their guardians, heirs, etc., of moneys collected as royalties by his representatives and specially authorizes the latter, as before indicated, to withhold such payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. It is under this regulation that the royalties already collected are being retained."

Then, going back to the Act of May 27, 1908, the court further said:

"By the Act of 1908, which imposed the restrictions on alienation and contained the leas-

ing provision, Congress further declared, in Section 9, 'that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids *any conveyance of any interest of such an heir* in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified *to the extent of sanctioning such conveyances as receive the court's approval*. Conveyances without its approval fall within the ban of the restrictions. *That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control.* Thus in a practical sense the court in exercising that authority acts as a *federal agency*; and this is recognized by the Supreme Court of the State. *Marcy v. Board of Commissioners*, 45 Okla. 1. Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes.

"In cases presenting the question whether lands inherited from allottees by full-blood Indian heirs are freed from restrictions by Section 9, and thus brought within another provision in the same act declaring that land 'from which restrictions have been or shall be removed' shall be taxable and subject to other civil burdens, the Supreme Court of the State and the Federal Court of that district have both held that under the proviso such land remains restricted in the hands of the full-blood heirs, and so is not within the taxing provision. *Marcy v. Board of Commissioners, supra*; *United States v. Shock*, 187 Fed. Rep. 870.

"Entertaining a like view of the proviso, we conclude that the land covered by the lease is still restricted land."

Then the court expressly refers to the fact that the lease involved was executed by the guardian of the allottee, a full-blood, during the lifetime of the allottee. The court further said:

"As to the other question, this is the situation: Under the Act of 1908, as already shown, leases of 'restricted lands' for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' *The present lease was made and approved under that provision.* The land was then restricted and the restrictions have not since been removed. Thus the event which the *regulations* and the *lease declare* shall terminate the supervision by the Secretary of the Interior of the collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some super-

vision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat., Sections 441, 463. *West v. Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nasqually v. Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provision or in any other of which we are aware. True, it is possible under the proviso in Section 9 for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until the restrictions expire in regular course—April 26, 1931. There is nothing in the *proviso* indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties*. A purpose to do that doubtless would be plainly expressed.

“In this situation we think the authority of the Secretary of the Interior to *supervise the collection, care and disbursement of the royalties has not terminated.*”

And we suggest that if Congress intended to give the County Courts exclusive jurisdiction to approve conveyances and then make the validity of mineral leases by the same class contingent on the approval of another Federal Agency—the Secretary—it would have been extremely easy to have expressly said so.

The decision in *Parker v. Richard* is correct, but we believe the opinion has been misunderstood by the Interior Department. The opinion does not hold that the words "restricted lands" used in Section 2, refer to the status of lands inherited by full-blood Indian heirs. Allotments inherited by full-blood Indian heirs are undoubtedly restricted in the sense that they cannot be *conveyed* by the heirs without the approval of the County Court, and that is all this court held. Did the death of the allottee remove all restrictions so as to terminate departmental supervision over an existing oil and gas lease executed by the full-blood allottee as absolutely required by Section 2? That was the question in *Parker v. Richard*. The pertinent part of Section 3 of the Act of 1908 is as follows:

"That no oil, gas, or other mineral lease entered into by any of said allottees prior to the *removal* of restrictions requiring the approval of the *Secretary of the Interior* shall be rendered invalid by this act, but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions *are removed by this act, or have been removed by previous acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any act of Congress*, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or

his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate."

Section 4 of the Act of 1908 says "That all lands from which restrictions have been or shall be *removed*, shall be subject to taxation and all other civil burdens," etc. Section 4 is as follows:

Sec. 4. "That all land from which restrictions have been or shall be *removed* shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the *removal of restrictions*, other than contracts heretofore expressly permitted by law."

Section 5 is as follows:

Sec. 5. "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes *prior to removal of restrictions therefrom*, and also any lease of such *restricted land* made in violation of law before or after the approval of this act shall be absolutely null and void."

Now, the County Court has no power to *RE-MOVE* restrictions from allotments inherited by full-blood Indian heirs, and neither has the Secretary of the Interior any power to remove restrictions from inherited lands. There is a good deal of difference between approving a conveyance made by an allottee or an heir, and removing restrictions. The removal of restrictions sets the Indian or the heir at large to make his own trade, free from any advice by the Secretary or any other Federal Agency; whereas, requiring the approval by a Federal Agency necessarily contemplates that such Federal Agency, the Secretary or the County Court, shall be more or less a party to the particular transaction—that is, the sale—in the sense that such Federal Agency will advise and consent to or disapprove the particular transaction. When the approval is required the approving agency passes on the sufficiency of the consideration and the fairness of the general terms of the contract or conveyance. On the other hand, where the Secretary removes all restrictions, the allottee is set free to make his own trade and rely upon his own judgment.

In *Parker v. Richard*, the court reached the correct conclusions in holding that the Department did not lose supervision because *all* restrictions had not been removed, the lease having been executed by a restricted allottee, or rather his guardian, before his death. Now, Sections 3, 4, and 5, in speaking of the “removal of restrictions” or “all land from which restrictions have been or shall be removed,” refer to

lands mentioned in Section 1 of the act, removing restrictions on certain classes and authorizing the Secretary of the Interior to remove restrictions on certain other classes. *The Secretary of the Interior is given authority by Section 1 to remove restrictions upon the lands of a full-blood allottee, but he has no authority to remove restrictions upon lands inherited by full-blood Indian heirs.* Therefore, as the restrictions had not been removed on the lands inherited by Eastman Richard, that is, removed by Act of Congress or by the Secretary of the Interior, the Department clearly did not lose jurisdiction over the existing lease, but that is a far different question from the one involved here, to-wit: Has the County Court authority to approve mineral leases executed by full-blood heirs? The decision in *Parker v. Richard* is grounded upon the theory that the restrictions had not been removed as provided for in Section 1 of the Act of May 27th, and not upon the theory that "restricted lands," as that phrase is used in Section 2, includes lands inalienable without the approval of the County Court. Thus, Mr. Justice VAN DEVANTER says:

"By Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that 'all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the*

Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.' There was NO SUCH REMOVAL in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.

“By Section 2 of the same act, Congress declared that ‘leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior, and not otherwise.’ The lease was given *under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity.* It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, *that the royalties thereunder should be paid to his representatives,* that, with exceptions not material here, the regulations as then or thereafter in force should be deemed *part of the lease,* and that in the event restrictions on alienation should be removed, the supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands.”

AS THE SECRETARY WAS GIVEN NO AUTHORITY by the Act of 1908 to remove restrictions from FULL-BLOOD HEIRS, or their inherited lands, but was given authority to remove restrictions from the full-blood ALLOTTEE, and as the County

Court was given no jurisdiction to REMOVE restrictions, but was given authority to APPROVE all conveyances of any interest of any full-blood Indian heir, is it any wonder that the bar, the Indian office, and those interested in leases construed Section 9 as in no way modified by Section 2? There is no absurdity in continued departmental jurisdiction after the death of a restricted allottee over a lease executed by the allottee with the approval of the Secretary. When the Secretary got jurisdiction and had control of the lease and royalties, there is nothing inconsistent in permitting him to retain such jurisdiction. But it is absurd to give the County Court jurisdiction to approve "any conveyance of any interest" of a full-blood heir, which necessarily includes the power to approve a conveyance of a life estate, or an undivided interest in the fee, or an absolute deed to the minerals, and then give the Secretary jurisdiction to approve mineral leases, although the Secretary, while having authority to remove restrictions from the full-blood allottee, has no jurisdiction to remove restrictions from the full-blood heir. And what we mean by removal of restrictions is not mere power to approve a conveyance. The grant of authority to approve conveyances is not a grant of authority to remove restrictions, because the power to remove restrictions means that the Secretary may make an order striking off the restrictions against alienation, thus leaving the allottee to make his own trade without the advice or as-

sistance of the federal agency. And it is clear that the phrase "Removal of restrictions" as used in Sections 1, 3, 4 and 5, refers to something entirely different from the power to approve conveyances. The approval of conveyances involves the advice and assistance of the federal agency in the identical contract or trade, including the power to pass on the consideration and other terms of the deed or conveyance; whereas, the "removal of restrictions," as used in Sections 1, 3, 4 and 5, means wiping the slate clean and turning the Indian loose to make his own trade and judge the sufficiency of the consideration for himself without the advice and assistance of the federal agency. The Department did not, upon the death of the full-blood allottee, lose jurisdiction over mineral leases executed by him during his life time, because restrictions were not removed within the meaning of that term, as clearly indicated by Sections 1, 3, 4 and 5. Thus our argument is sound, that the words "restricted lands," as used by Section 2 of the act, mean lands from which the Secretary is authorized by Section 1 to remove the restrictions. The Secretary has no authority to remove restrictions from inherited lands and Section 9 names the only federal agency who has any authority, and that is the County Court, and its authority is confined to the mere approval or disapproval of the particular conveyance in question—the County Court having no authority to remove restrictions by any order operating to allow a full-blood heir to make his own trade.

Departmental Construction.

We have said that the Department for a period of about 10 years disclaimed jurisdiction to approve oil and gas leases executed by full-blood Indian heirs. Those in the Department from 1908 to 1919 *familiar with the subject* will not deny this. We realize this court is far from the scene of the application of this act and unfamiliar with the local and departmental concurrent construction thereof, and we offer the following evidence as conclusive proof of our assertion that the Department claimed no jurisdiction for more than 10 years.

1st. It has been the uniform rule of the Department to require all mineral leases to be executed in quadruplicate on a form specially prepared by the Department. As the United States Courts take judicial notice of the rules and regulations prescribed by the Interior Department (*Caha v. United States*, 152 U. S. 213, 38 L. ed. 415), we refer to the following rules: Section 1 of the rules prescribed by the Secretary under the authority of the Original Curtis Bill of June 28, 1898 (30 Stat. L. 495), promulgated November 4, 1898, required leases to be made upon blank forms prescribed by the Secretary, and said that "no lease otherwise made shall be valid or have any effect whatever to vest in the lessee any right or interest either at law or in equity," and Section 2 required the lease to be in quadruplicate, and then the regulations go on to set out the various terms of the lease, fixing the royalties, etc. The Secretary's

rules prescribed for carrying into effect the provisions of Section 72 of the Cherokee Agreement, approved by the Act of Congress of July 1st, 1902 (32 Stat. L. 716), Section 2 thereof, required all leases to be in quadruplicate, one part to be filed with the Commissioner of Indian Affairs, one part with the agent at Union Agency, one to be delivered to the lessee, and one to the lessor, and also required that "All leases must follow the form approved by this Department and accompanying these regulations." These regulations go on to set out the terms of the lease, royalties, and other provisions, and the Secretary had forms printed for the use of lessees and they could be obtained for a consideration of \$1.00 from the Indian Agency at Muskogee. These rules were amended on March 20, 1905, and again on April 22, 1905, on May 23, 1905, on June 8, 1905, on December 27, 1905, and on May 22, 1906. By the amendment of May 22, 1906, it is provided that "oil and gas leases executed after June 15, 1906, shall be on form 'A,' this day prescribed," and then rules were made requiring the application for the Secretary's approval to be made on form "B" and a certificate on form "C", blank forms printed by the Department. Then follows the leasing regulations approved June 7, 1906, prescribed under the provisions of Sections 19, 20 and 22 of the Act of Congress of April 26, 1906. These rules required leases to be in quadruplicate and on a form prescribed by the Secretary and application made and bond filed on forms

prescribed by the Secretary. Elaborate provisions were made for the terms of the leases and the manner of applying to have them approved, payment of royalty, etc. Section 15 thereof expressly provided

"Oil and gas leases shall be executed upon form prescribed and furnished by the Department, and shall be accompanied by an application (Form B), under oath, and a certificate (Form C) of an officer of some bank, such forms and the form of lease (Form A) to be furnished applicants by the Indian Agent at Union Agency. The application shall be considered a part of the lease."

Section 25 of the same regulations is as follows

"All leases which require the approval of the Secretary of the Interior must be submitted to the Indian agent, Union Agency, for transmittal *within thirty days*, from and after the date of the execution of the lease, and all such leases which have been heretofore executed must be submitted to said agent within thirty days from the date of the approval of these regulations. *No such lease presented after the time herein designated will be received by the agent or transmitted to the Department or regarded as having any effect whatever.*"

Then the revised leasing regulations of June 11, 1907, make similar requirements, with forms furnished by the Secretary and the leases required to be in quadruplicate. The same is true under the revised regulations of April 20, 1908, and the regulations of June 20, 1908, and all the regulations prescribe form for the leases, forms for the application for approval

al, forms for bonds, and forms for affidavits, and all leases were required to be filed in the office of the Union Agency *within thirty days after date*, the validity of which regulations was sustained by this court in *Anicker v. Gunsburg*, 246 U. S. 110.

As late as June 1st, 1916, the Department re-promulgated its rules, Section 41 being as follows:

“Applications, leases, and other papers must be upon forms prepared by the Department, and upon application the Indian agent at Muskogee, Oklahoma, will furnish prospective lessees with such forms at a cost of \$1.00 per set.”

2nd. *Now, bearing in mind that the opinion of this court in Parker v. Richard was handed down June 2, 1909. Honorable Cato Scells, Commissioner of Indian Affairs, in a letter dated September 18, 1919, addressed to the Secretary of the Interior, which letter was approved by Assistant Secretary Hopkins on September 23, 1919, admits that the Interior Department had not prior thereto claimed jurisdiction to approve leases executed by full-blood heirs. The letter explains itself and is as follows (italics ours):*

“L-C 71916-19 W. D. W., Inclosure 16438

September 18, 1919.

“The Honorable,

The Secretary of the Interior.

“Sir: There is enclosed a letter dated August 21, 1919, from James B. Diggs and Faust and Wilson, Attorneys for the Gypsy Oil Co.,

submitting a brief in the matter of the application of the Gypsy Oil Company for the approval of oil and gas mining leases on commercial forms covering lands inherited by full-blood members of the Five Civilized Tribes. Zeveryly and Beall, attorneys for the Sinclair Oil & Gas Company, concur in the brief and argument, and declare the readiness of that company to submit like leases for Departmental approval.

“With the brief are two oil and gas mining leases, one from Eastman Richard, husband and heir at law of Yarna Richard, to A. L. Funk, covering the NW $\frac{1}{4}$ of Sec. 4, T. 17 N., R 7E. and the other from Jeanetta Richard and Eastman Richard as guardian of the estate of Jemina, Samuel, Minnie and Rina Richard, heirs of Yarna Richard, in favor of R. C. Jones & Company, covering an undivided 2/3rds interest in lot 4. Sec. 4, T. 17N, R. 7E., the homestead allotment of the deceased allottees. Each of the leases is for ten years from date (March 20, 1912, and April 22, 1912, respectively), and as long thereafter as oil or gas is found in paying quantities, and provides for a royalty of $\frac{1}{8}$ th of the oil produced. Each of the leases bears the approval of the judge of the County Court of McIntosh County. The Gypsy Oil Company owns an interest in each lease by assignment.

“The brief sets out in detail the reasons why it is considered that the Secretary of the Interior has no jurisdiction whatever over the land. That part of Section 9 of the Act of May 27, 1908, relative to the removal of restrictions upon the allottee's land by his death are quoted, and it is argued that the language of the proviso ‘That no conveyance of any interest of any full-blood Indian heir in such land shall be valid un-

less approved by the court having jurisdiction of the settlement of the estate of said deceased allottee' includes leases, a number of citations being made to show that a mining lease has been considered as a conveyance of an interest in the land.

"The position taken in the brief as to the jurisdiction of the County Court of leases of land inherited by full-blood Indians had been accepted as correct, not only by the lessees and Indians, but also by the office of the Superintendent for the Five Civilized Tribes for several years. It appears that Superintendent's office had attempted to exercise no jurisdiction whatever over land of deceased Indians except in cases where the second proviso of Section 9 applies.

"Although the attorneys for the company set forth at length their reasons why they believe that leases of inherited land are not subject to the jurisdiction of the Secretary of the Interior they state that the Gypsy Oil Company is willing to have its existing commercial leases approved by the Secretary of the Interior with the understanding that the leases will be subject to the regulations of the Department of the Interior and the provisions of the Department lease form. They protest against being required to enter into a new lease on Departmental form or to have the value of the leases assessed as of the date they were originally taken. They also protest against the acreage covered by such leases being considered in the 4800-acre maximum. They invite attention to the fact that all such leases were authorized and approved by the County Court, were purchased in the open market, and in nearly all cases the purchase was the result of competitive bidding had under judicial

authority and subject to judicial control. They add that nearly all of the leases have been assigned to persons who purchased them, relying in full faith on such judicial determination and in the bona fide belief that the court had full and exclusive jurisdiction.

“In the opinion of the attorneys, the approval of the County Court is necessary for the validity of an oil and gas lease of land inherited by full-blood heirs and the part of the leasehold interest belonging to the lessee is free from any Departmental control, but as to the payment of royalties to the Indian the department has jurisdiction.

“As heretofore stated the office of the Superintendent for the Five Civilized Tribes for several years attempted to exercise no jurisdiction over land inherited by full-blood heirs so that the statements contained in the brief as to the practice of leasing such land for oil and gas subject only to the approval of the County Court are correct so far as there being no attempt by the Superintendent to control such leases is concerned.

“The question of whether land inherited by a full-blood heir is free from restrictions and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of royalties had terminated were considered in the case of *Gabe E. Parker et al. v. Eastman Richard and R. D. Martin*. The land of the allottee was covered by an oil and gas mining lease at the time of his death, and the royalties in question arose thereunder. The court held that until the interest of the full-blood heir was conveyed and the conveyance approved

by the court in accordance with Sec. 9 of the Act of May 27, 1908, the land was restricted.

“As to a lease on such land and the royalties arising thereunder, the court said:

‘Under the Act of 1908, as already shown, lease of “restricted lands” for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, “and not otherwise.” The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior of the collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some supervision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. R. S., Secs. 441, 463. *West v. Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provisions or in any other of which we are aware. True, it is possible under the proviso in Sec. 9, for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until restrictions expire in regular course—April 26, 1931. There is nothing in the proviso indicating that it is

intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the lease or the royalties. A purpose to do that doubtless would be plainly expressed.'

'In this situation we think the authority of the Secretary of the Interior to supervise the collection, care and disbursement of the royalties has not terminated.'

"From the language used by the Supreme Court of the United States in the *Eastman Richard* case, the office believes that oil and gas mining leases covering the interest of full-blood heirs must receive the approval of the Secretary of the Interior in order to be valid. *It is the opinion that no leases should be recognized which were executed after June 2, 1919, the date of the decision in the Eastman Richard case, except those on Departmental forms.*

"As to leases executed prior to that date, which were authorized and approved by the County Court, and in the making of which no fraud is alleged, the office believes that it would be but fair and just to approve such leases and assignments thereof subject to the regulations of this Department the rates of royalty to be not less than those prescribed in the regulations, and all such royalties to be payable to the Superintendent for the benefit of the full-blood heirs.

"It is therefore recommended that the Superintendent be authorized and directed to receive and forward for consideration, with such reports and recommendations as to him may seem proper in each case, applications for the approval of *commercial oil and gas mining leases* approved by the County Court on and before

June 2, 1919; and the assignment thereof; that the applicants be required to show that the lessors through whom they claim are the only heirs of the deceased allottee; that they furnish with the leases an abstract of title showing that there are no conflicting existing leases of record; that they be required to show the amount of development work performed and the present production of oil and gas, and that in case of conflicting leases all interested parties be given opportunity to present whatever showing they desire before the cases are submitted to the Department for action.

“The office fears that there may be attempts on the part of some persons to negotiate oil and gas mining leases on Department form with the full-blood heirs in cases where the land has been developed under commercial leases. It is not believed that any such leases should be given favorable consideration, but that the present owners of commercial leases who have in good faith taken the land should be allowed to keep such leases on condition that they submit them to the Department for approval, with bonds in the proper amount, and agree that the regulations of the Department apply thereto.

“With regard to the request of the companies that the 4800-acre rule be not applied to the leases in question, the office recommends that the rule apply in all cases where the lessee has less than the maximum acreage, and that in the event the approval of such commercial leases brings the acreage of the lessee above the maximum such leases be approved regardless of the 4800-acre limit, but that the lessee be not permitted to take any additional leases so long as his acreage equals or exceeds 4800 acres.

"It is recommended further that the Superintendent be authorized to give public notice that lessees will be entitled to retain the land leased by them on condition that they comply with the foregoing conditions within sixty days from date of notice.

Very respectfully,

(Signed) Cato Sells, Commissioner.

8-29-Meg.

Approved Sep. 23, 1919; Sgd. S. G. Hopkins, Asst. Secretary."

While we are unable to obtain a copy of the Secretary's reply, we do know that Honorable Gabe E. Parker, Superintendent of the Five Civilized Tribes, did, on October 3, 1919, promulgate the following order:

"October 3, 1919.

"To Whom It May Concern:

"I am in receipt of a letter from Honorable Cato Sells, Commissioner of Indian Affairs, dated September 24, 1919, authorizing me to give public notice relative to leases made by full-blood heirs in accordance with a decision of the Department of the Interior, as substantially follows:

"That the owner of a *commercial lease* made by full-blood heirs of a deceased citizen of the Five Civilized Tribes at a time *prior to June 2, 1919*, the date of the decision of the Supreme Court in the case of *Parker v. Eastman Richards et al.*, will be entitled to hold same where no fraud is alleged, by making application for the approval of same within sixty days from date of this notice, and complying with certain conditions.

"The Superintendent is authorized to receive and forward for consideration, with such report and recommendation as he may deem proper in each case, applications for approval of *commercial leases* approved by a County Court on or before *June 2, 1919*, and assignments thereof; that the applicant be required to show that the lessors through whom he claims are the only heirs of the deceased allottee, to furnish an abstract of title to show that there are no conflicting leases of record, and that in case of conflicting leases, all interested parties be given an opportunity to present whatever showing they desire before the cases are submitted to the Department for action; that they be required to show the amount of development work performed and the present production of oil and gas; and that the applicant agree that the rates of royalty be not less than those prescribed in the regulations, and that all payments shall be payable to the Superintendent for the benefit of the full-blood heirs.

"No leases will be recognized executed after *June 2, 1919*, except those on Departmental form.

"Any additional information at hand will be gladly furnished.

Sincerely yours,

Gabe E. Parker,

Superintendent for the
Five Civilized Tribes."

(Italics ours.)

What the Superintendent meant by "commercial lease" is a mineral lease not on a form prescribed by the Secretary but one on the customary form in

1913, I have to advise you that this Department holds that allotments in the Five Civilized Tribes of Oklahoma, held by heirs who are full-blood Indians, cannot be alienated without the approval of the Secretary of the Interior where the allottee *died prior* to May 27, 1908, and that oil and gas leases on *such lands* require approval by the Secretary.

"You are further advised that the Department holds that where allotments were selected subsequent to the death of the person in whose name the selection was made the heirs succeeded to the ownership of the land as original allottees and not by inheritance, and that in such cases the lands are subject to restrictions to the same degree as other original allotments.

"Without attempting to advise you concerning all the possible cases which might be presented I suggest that it would be advisable to consult the Department if you are interested in any other cases not fully covered by the rulings referred to above.

Respectfully,

(Signed) Lewis C. Laylin,

Assistant Secretary.

Copies to Ind Off and Union Agency."

In *United States v. Knight*, 206 Fed. 145, the Eighth Circuit Court of Appeals held against the Department on the contention that the act was merely prospective, and sustained the jurisdiction of the County Court to approve conveyances executed after the act by heirs who inherited the lands before the act. The Government did not appeal. The other con-

tention that lands allotted to heirs, was rejected by every court passing on the question and finally rejected by this court in *Harris v. Bell*, decided at the present term. But the significant thing in Mr. Laylin's letter is the absence of any contention that the Department had jurisdiction to approve mineral leases executed by full-blood heirs after the Act of May 27, 1908. Honorable Dana H. Kelsey was United States Indian Superintendent at the time the Act of May 27, 1908, was passed, and for many years thereafter, and Appendix "C" to this brief is a copy of a letter written by Kelsey explaining his connection with the act and stating the Departmental construction. While the Departmental construction of the Act of May 27 is not conclusive nor binding, it ought not, where long relied upon, to be set aside except for cogent reasons. As said in *Heath v. Wallace*, 138 U. S. 573, 587, 34 L. ed. 1063, 1069, "The construction given to a statute by those charged with the execution of it is always entitled to the most respectful construction, and ought not to be overruled without cogent reasons." Or, as said in *Hahn v. United States*, 107 U. S. 407, "In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." The Department immediately seized upon the opinion of this court in *Parker v. Richard*, and for the first time asserted jurisdiction in this class of cases. From the passage of the Act of May 27, 1908, up to the

decision of the Court of Appeals in *United States v. Knight*, on July 28, 1913 (206 Fed. 145), the Department claimed the County Court had no jurisdiction to approve conveyances executed by full-blood heirs inheriting the allotment prior to the date of the act—that was on the theory that the act was prospective—and also claimed jurisdiction for awhile in cases where the lands were allotted to the heirs as distinguished from the lands technically inherited by the heirs. But in all that time and up until *Parker v. Richard*, the Department did not claim jurisdiction to approve mineral leases executed by full-blood heirs inheriting an allotment after the Act of May 27, 1908, and now to set aside that long-standing Departmental rule, on at least a strained construction of the statute, and judicially strike down the jurisdiction of the County Courts means bankruptcy and disaster to a great many parties who invested their money in leases approved by the County Court. The notice given to the public on October 3, 1919, by Honorable Gabe E. Parker, Superintendent of the Five Civilized Tribes, that the Department would consider applications for the approval of *commercial leases* approved by the County Court on or before June 2, 1919 (the date of this court's opinion in *Parker v. Richard*), shows conclusively that the Department is aware of the great number of these leases and the disastrous and inequitable consequences following from a decision adjudging them void for the want of the Secretary's approval. We

might pause here to say that a *commercial lease* is a mere name for mineral leases not on Departmental form. The commercial lease carries a royalty from one-eighth of the proceeds of the oil to one-half as the maximum—just as the parties may agree. Whereas, the Departmental lease always requires one-eighth of the oil as royalty. The commercial lease is on a short form and the Departmental lease is on a lengthy form hedged about with numerous regulations, etc.

Further on Departmental Construction.

It may be suggested that the Secretary of the Interior has indicated a willingness to protect bona fide lessees by his notice of October 3, 1919, published by the Superintendent of the Five Civilized Tribes, wherein he says that *commercial* leases may be submitted for approval and will be approved where there is no fraud charged. Of course it is easy to charge fraud and a charge of fraud before the Department, though sustained by no evidence, discounts the opportunity to get a lease approved, and then besides it is difficult to get the Department back to the atmosphere surrounding the execution of a lease many years before it ever proved valuable and the temptation to compel the lessee to pay an extra bonus is almost irresistible, although the bonus, at the time the lease was executed, was entirely adequate and reasonable. Subsequent developments however having proven the property valuable it is hard

to resist the temptation to make the lessee divide his good fortune with the lessors. Then besides there is no such thing as owning property where the validity of the title is contingent upon the capricious whim of some official who can not be controlled by any rules of law and subject only to his arbitrary whim, for which he is required to give neither rhyme nor reason. The validity of these leases, if subject to the approval of the Secretary, is absolutely contingent upon the discretion of the Secretary, and the courts have no jurisdiction to review his discretion or control it in advance. *Anicker v. Gunsburg*, 246 U. S. 110

We are not complaining, however, that the Secretary has not been fair to our clients. We can not speak for others. The thing is that no man owns property where the title is contingent upon the discretion of a third party, though he may be a high Government official; and having invested large sums of money—one of our clients over two million dollars—in purchasing such leases after they were developed, we feel constrained to suggest that we are interested in sustaining the validity of the leases without the necessity of the Secretary's approval.

Question :

Is a commercial lease executed by full-blood Indian heirs after the Act of May 27, 1908, and approved by the court, rendered valid by the Secretary's approval, the lease not having been made sub-

ject to the Secretary's approval, but in violation of his rules, and without any intention of the lessor and lessee to submit it to the Secretary's approval?

In other words, can the Secretary now approve these commercial heir leases and render them valid if they were invalid for the want of his approval? After the Department construed the opinion in *Parker v. Richard* as holding the courts had no jurisdiction to approve such leases, full-blood heirs, without any allegation of fraud, and generally at the instance of some third party who hoped eventually to get the lease, commenced suits in the courts to cancel such leases on the allegation that they were void because not approved by the Secretary, although approved by the County Court, and in those cases the Indian lessors and their co-agitators are contending that under Section 5 of the Act of May 27, 1908, such leases are absolutely void, no more than a blank piece of paper, and that the Secretary can not render them valid by now approving them. They contend that such leases were not taken subject to the Secretary's approval and that consequently they can not be subsequently approved, especially after the lessors have commenced a suit to set them aside. They contend that the Secretary is powerless to remedy the great wrong brought about by the Department's long-standing construction and disclaimer of jurisdiction; that the leases not having been made subject to the Secretary's approval as expressly provided in Departmental rules, they are void be-

cause taken in violation of law and under Section 5 of the Act of May 27, 1908, their invalidity can not be obviated by the Secretary's approval. Thus it will be seen that no matter what the Secretary may do, we will be involved in hazardous litigation for several years.

We hope we have been able to get the court in the atmosphere of this condition, and feeling confident that the question here involved was not decided nor intended to be decided in *Parker v. Richard*, we respectfully submit that the opinion in this case should sustain the jurisdiction of the County Courts, and remove from millions of dollars' worth of leases taken in good faith, the cloud cast upon their validity by the Departmental construction of the opinion of this court in *Parker v. Richard*.

Respectfully submitted,

GEO. S. RAMSEY,
JAMES A. VEASEY,
JOHN M. CHICK,
G. EARL SHAFFER,
EDGAR A. DE MEULES,
JAMES C. DENTON,
MALCOLM E. ROSSER,
VILLARD MARTIN,

Amici Curiae.

Appendix.

Appendix "A"

The following is a copy of the opinion of Assistant Attorney General Campbell:

"The third question submitted is: 'Whether, under said second proviso, leases heretofore duly made under said acts confirming agreements with said nations, by members of the Seminole, Choctaw and Chickasaw Nations, are legal and binding without the approval of the United States Indian Agent at the Union Agency and the Secretary of the Interior under rules and regulations to be prescribed under said provisions of the Indian Appropriation Act.'

"The matter referred to as 'the second proviso,' is, presumably, the extract first herein quoted from the Indian Appropriation Act. The paragraph in which it appears has two provisos, in the second of which is found this provision removing restrictions from alienation. That provision makes no reference to leases as such.

"The matters of alienation of lands by Indian allottees and of leasing, are treated of and provided for in the various agreements and acts as entirely separate and distinct matters. It is true a lease of land in a certain sense is an alienation. It transfers to and vests in the lessee certain rights of possession and use of the land but does not convey to him the title. The alienation

from which it was intended by the Indian Appropriation Act to remove restrictions, was that character of proceedings which would involve the sale and transfer of the title. The provisions of the various agreements and laws relative to and governing the leasing of allotted lands were not intended to be and are not affected by this provision of the Indian Appropriation Act. A lease that was before not legal or binding without the approval of the Indian Agent and the Secretary of the Interior, is now equally ineffective without such approval. In other words, this is not a confirmatory provision and does not purport to cure defects in existing instruments or, in fact, to in any manner affect the leases. The rules and regulations to be prescribed under this provision of the Appropriation Act are with respect to the removal of the restrictions upon alienation by allottees of said tribes of Indian blood, except minors, and except as to homesteads and it is not contemplated by the act that such rules and regulations should have any effect upon the manner of execution or approval of leases of allotted land."

Appendix "B"

Again, on July 21, 1905, the Assistant Attorney General for the United States, in an opinion delivered at the request of the Secretary of the Interior, over a contest for a lease between Meridian Oil & Gas Company and the National Oil & Development Company, for the second time passed upon this question. The Assistant Attorney General said:

"The contention in behalf of the National Company that since the Act of April 21, 1904,

removing restrictions upon alienation of land of allottees of the Five Civilized Tribes who are not of Indian blood, except minors and except as to homesteads, such allottees may lease their lands without approval of the Secretary of the Interior, cannot be sustained. In the opinion of May 6, 1904, it was pointed out that the matters of alienation of land by Indian allottees and of leasing, were treated of and provided for in the various agreements and acts as separate and distinct matters, and it was said:

‘The alienation from which it was intended by the Indian Appropriation Act to remove restrictions, was that character of proceedings which would involve the sale and transfer of the title. The provisions of the various agreements and laws relating to and governing the leasing of allotted lands were not intended to be and are not affected by this provision of the Indian Appropriation Act’.”

Appendix “C”

Tulsa, Oklahoma, Dec. 22nd, 1920.

Mr. Geo. S. Ramsey,
Attorney at Law,
Muskogee, Okla.

Dear Sir: Acknowledging your letter of the 6th inst., calling attention to Sections 2, 3 and 9 of the Act of Congress approved May 27, 1908, known as the “Removal of Restrictions Act—Five Civilized Tribes.”

You ask for statement as to my understanding of the Department’s interpretation of said Act, in

respect to its authority to approve oil and gas leases executed by full-blood Indian heirs.

As you know, I was in charge of this work for the Five Civilized Tribes of Indians as Indian Agent and Superintendent for nearly ten years prior to January 1, 1915, and, while I cannot, in view of the lapse of time, recall the names of any specific cases where the Department construed Section 9, my recollection is very distinct that there were instances where leases were executed by the full-blood heirs of allottees, such leases presented for the approval of the Department, and I was instructed, or authorized to say, that such leases did not require Departmental approval, except in the case of homesteads inherited by a certain class of minors, particularly covered by the proviso of said Section 9.

I was frequently in Washington in consultation with the officials of the Department of Interior and the matter of the jurisdiction of the Department with reference to the sale and leasing of inherited lands was discussed with them, not only immediately after the passage of the Act of May 27, 1908, but at different times thereafter, and at no time prior to the decision in the so-called *Parker-Richards* case, during my entire service, was there any contention that leases for oil, or gas, or any other purpose, made by the heirs of deceased *allottees* of the Five Civilized Tribes, with the one exception of homesteads inherited by a certain class of minors, as above mentioned, required Departmental approval. The advice and instructions I received at all times were to the effect that Section 2 of said Act of May 27, 1908, ap-

plied only to *allottees* of the restricted class, and it was considered that all restrictions, so far as the Department was concerned, were removed by Section 9 on all inherited lands, with the exception, as stated, of those homesteads inherited by a certain class of minors.

Section 3 of the Act of May 27, 1908, specifically provided that the owner, or owners of any allotted land, in agreement with the lessee, on which restrictions were removed, would have the power to cancel and terminate any lease, which in itself indicates that it was the intention of Congress in all cases where the Departmental restrictions were removed by this Act, to allow the lessor and the lessee to annul their contracts, or operate same without the supervision of the Department.

During the consideration of the passage of the Act of May 27, 1908, I was called to Washington by the then Secretary of the Interior and was selected as a member of the Committee composed of the late Hon. Thomas Ryan, for many years First Assistant Secretary of the Interior, and a Mr. Lewis, from the Department of Justice, to assist the Secretary in the preparation of his reports and recommendation upon this bill. We were engaged in this work, and consultation with the officials of the Department and members of the Indian Committee of Congress, for two or three weeks prior to the passage of said Act. I recall very clearly the history of Sections 2, 3 and 9 of this bill, and I think the correspondence in the files in Washington, both in the Interior Department, and the Indian Committees of Congress, will show

that the language of these Sections was changed several times during the progress of the bill to finally meet the views of the members of Congress and the Interior Department. There was an insistent demand from Congress that all restrictions be removed from inherited lands and when the first provision of Section 9 was proposed by the Secretary of the Interior, Mr. Garfield told Judge Ryan and myself that he would not agree to all these inherited lands being absolutely turned loose without some protection for the full-blood heirs, and in a conference with Senator Owen, who was then in charge of the bill in the Senate, with Secretary Garfield, Judge Ryan, and myself, it was suggested that the full-bloods could be protected by removing the restrictions, so far as the Department was concerned, by giving jurisdiction to the Probate Courts of the State of Oklahoma to approve the conveyances of such full-blood heirs, and there was no thought in any of this discussion that there would be any future supervision by the Department over this class of cases.

I have not talked to Senator Owen about this matter since the passage of the Act under discussion, but I am quite sure he will recall this conference. Undoubtedly, the intention of Congress and the Department at that time was that the death of any allottee of the Five Civilized Tribes should remove all restrictions, either as to leasing or sale of said deceased allottee's land, so far as the supervision of the Department was concerned, except in the case of homesteads inherited by a certain class of minor heirs, as specifically covered by the second proviso of said Section 9.

I understand that the particular question as to the authority of the Department to approve leases executed by full-blood Indian heirs is now before the court in a case in which you are counsel. If you desire my testimony, or deposition, with reference to any of the facts stated herein, I will be very glad to be at your service.

Yours very truly,

DHK-EB

(Signed) Dana H. Kelsey.

Appendix "D"

"COMMERCIAL LEASE."

00-304 Producers—Special 88. The Star Printery, Muskogee, Oklahoma.

OIL AND GAS LEASE.

Agreement, Made and entered into the day of, 191.., by and between of hereinafter called lessor (whether one or more), and hereinafter called lessee:

Witnesseth, That the said lessor for and in consideration of Dollars cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, ha.. granted, demised, leased and let and by these presents do.. grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures thereon to produce, save and

take care of said products, all that certain tract of land situate in the County of, State of Oklahoma, described as follows, to-wit:
of Section, Township, Range, and containing acres, more or less.

It is agreed that this lease shall remain in force for a term of years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in pipe line to which it may connect its wells, the equal one-eighth part of all oil produce and saved from the leased premises.

2nd. To pay the lessor Dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making own connections with the well at own risk and expense.

3rd. To pay lessor for gas produced from any oil well and used off the premises at the rate of Dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

If no well be commenced on said land on or before the day of, 191., this lease shall terminate as to both parties, unless the lessee

on or before that date shall pay or tender to the lessor, or to the lessor's credit in the Bank at or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the said lessor only in the proportion which interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operation thereon, except water from wells of lessor.

When requested by lessor, lessee shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the owners.

Lessee shall pay for damages caused by its operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed the covenants herein shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof, and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail

or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described land, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

.....
.....

In Testimony Whereof We Sign, this the
day of, 191..

..... (Seal)

..... (Seal)

Witnesses:

Appendix "E"

"COMMERCIAL LEASE."

Oklahoma Form No. 4—Olds Press, Printers,
Tulsa, Okla.

OIL AND GAS MINING LEASE.

Agreement, Made this day of,
19.., by and between of
....., and
hereinafter respectively called lessor and lessee,
whether one or more.

That the lessor, for and in consideration of the sum of Dollars, paid by lessee, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the lessee, for the sole and only purpose of mining and operating for oil and gas, installing gas pumps, laying pipe lines, building tanks, stations and structures thereon to produce, store and convey said products, all that certain tract of land situated in the county of, State of, described as follows, to-wit: of Section, Township, Range containing acres, more or less.

To Have and To Hold the same for the term of five years from this date and as long thereafter as oil and gas or either of them is produced from said land by lessee, successors, or assigns.

In consideration of the premises, the lessee covenants and agrees:

First: To pay the lessor as royalty one-eighth part of the proceeds of all the oil saved and sold from that produced on said premises and to run such oil to pipe line companies to which lessee may connect well or wells under division orders placing one-eighth part of said proceeds to lessor's credit, or at lessee's option, to pay to lessor one-eighth part of the market value of such oil in the field where produced on the day the same is sold, run or stored, and in this last event, settlement shall

be made by lessee by the 15th day of each month for the royalty accrued during the preceding month;

Second: To pay lessor Dollars each year in advance for the gas from each well where gas only is found while the same is being sold or used for other purposes than in operating leased premises, the lessor to have gas free of cost from such well for all stoves and inside lights in the principal dwelling house on said land during the same time by making own connections with the well; and,

Third: To pay lessor for gas produced from any oil well, including casinghead gas, used or utilized for other purposes than in operating leased premises, at the rate of dollars per year for the time during which such gas is used or utilized; payments to be made each three months in advance.

The lessee agrees to commence drilling a well on said premises within one year from date hereof, or pay at the rate of Dollars for each additional year such commencement is delayed from the time above mentioned. The completion of such well shall be and operate as a full liquidation of all rentals under this provision during the remainder of the term of this lease unless the same shall prove to be a dry hole, in which event, at the next succeeding rental paying date, the lessee may resume payment of rentals, such payments to cease on the completion of a producing well.

The lessee shall have the right to use, free from royalty or rental, oil and gas produced from said

land in drilling and operating thereon, and also water from wells other than those of the lessor.

When requested by lessor, the lessee shall bury pipe lines below plow depth. The lessee shall pay for damages caused by drilling to growing crops.

If the lessor owns a less interest than the entire undivided fee simple in above land, then the royalty and rentals hereinbefore provided shall be paid to the lessor only in the proportion which his interest bears to the entire fee.

On the termination of this lease for any cause the lessee shall have the right at all times to remove all machinery, fixtures and property placed on said premises, including the right to draw and remove casing, and all machinery, fixtures, property and casing on said premises shall remain the property of the lessee.

The lessee is given the right to assign this lease in whole or in part and if it be assigned as to a particular portion of the acreage covered thereby lessee shall be liable for royalties accruing only from production on the acreage retained and be liable for rentals only in the proportion that the acreage unassigned bears to the entire leased acreage, and lessee's assignee shall be liable for royalties accruing only from production on the acreage assigned and be liable for rentals only in the proportion the acreage assigned bears to the entire leased acreage, and in no event shall this lease be cancelled or forfeited as to lessee for failure to pay rentals or royalties so long as lessee shall pay rentals or royalties on the acreage retained, nor as to such assigns so long as

they shall pay rentals or royalties on acreage assigned.

This lease shall be forfeited or cancelled only for failure to make payments for delay in drilling, and the right to forfeit or cancel, or to have it declared forfeited, cancelled or set aside for failure to comply in whole or in part with any implied condition, covenant, stipulation, agreement, undertaking, duty or obligation, is hereby expressly waived and released.

If the leased premises are hereafter owned in severalty or in separate tracts the premises nevertheless shall be developed and operated as an entirety and royalties shall be paid to each separate owner in the proportion that the acreage owned by him bears to the entire leased acreage, and lessee shall not be bound by any change in the ownership of the leased acreage unless and until notified thereof in writing, and when such change is effected by will, deed or other written instrument said notice shall be accompanied by such instrument or a duly authenticated copy thereof. This stipulation and all other stipulations, covenants, conditions, agreements and terms of this instrument shall extend to and be binding upon the heirs, executors, successors, assigns and the legal representatives of the parties hereto:

If the lessee shall commence to drill a well within the term of this lease or any extension thereof the lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil or gas, or either of them, be found in paying quantities this lease shall continue and be in force

with like effect as if such well had been completed within the term of years herein first mentioned.

All payments under this lease shall be made to the lessor, or, with like effect, check for such payment may be mailed to Bank of
 or its successors, for deposit to lessor's credit.

The lessee, successors or assigns, shall have the right at any time, on payment of One Dollar to the lessor, heirs or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, provided that this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of a suit in any court of law or equity by the lessee to enforce this lease or any of its terms or to recover possession of the leased acreage, or any part thereof against or from the lessor, heirs, executors, administrators, successors or assigns, or any person or persons.

.....

In Witness Whereof, the parties have hereunto set their hands this the day and year first above written.

....., Lessor.
 , Lessee.

Witnesses:

ANCHOR OIL COMPANY *v.* GRAY ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 188. Argued January 27, 1921.—Decided June 1, 1921.

1. The authority of the Secretary of the Interior under § 2 of the Act of May 27, 1908, c. 199, 35 Stat. 312, to approve an oil and gas lease made by a full-blood Creek allottee is not taken away, under § 9, by the death of the allottee. P. 522.
2. As respects the rights of the allottee's heirs and those claiming under them with notice of such outstanding lease, the approval relates back and takes effect as of the execution of the lease by the parties named therein. P. 522.
3. Under the Act of March 1, 1907, c. 2285, 34 Stat. 1026, the lodging of such lease in the office of the United States Indian Agent (now Superintendent of the Five Civilized Tribes) at Muskogee, for transmission to the Secretary of the Interior, constituted constructive notice to persons who, after the death of the lessor and after the lease had been approved by the Secretary, took another lease from the lessor's heirs. P. 522.
4. The provision of the Act of March 1, 1907, making the filing of Indian leases with the Indian Agent at Muskogee constructive

notice, was not superseded by the admission of Oklahoma as a State or as a result of provisions in the Enabling Act of June 16, 1906, and in the state constitution adopted thereunder. P. 523.
257 Fed. Rep. 277, affirmed.

THE case is stated in the opinion.

Mr. John Devereux, for appellant, submitted.

Mr. Preston C. West, with whom *Mr. A. A. Davidson* was on the brief, for appellees.

Mr. Geo. S. Ramsey, *Mr. Malcolm E. Rosser*, *Mr. Villard Martin*, *Mr. James A. Veasey*, *Mr. John M. Chick*, *Mr. G. Earl Shaffer*, *Mr. James C. Denton* and *Mr. Edgar A. deMeules*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a suit in equity instituted by appellant against appellees in a state court of Oklahoma, involving the ownership of a leasehold estate for oil and gas mining purposes in a Creek Indian allotment containing 80 acres, situate in Tulsa County, Oklahoma. Upon petition of appellees it was removed to the United States District Court upon the ground that it arose under the Constitution and laws of the United States; a motion to dismiss the suit was granted by that court, the decree of dismissal was affirmed by the Circuit Court of Appeals for the Eighth Circuit (257 Fed. Rep. 277), and an appeal brings the case here.

From appellant's amended petition it appears that the 80 acres were allotted to Jennie Samuels, a full-blood Creek Indian, as her distributive share of the lands of the tribe, and patented to her in the year 1903. December 5, 1914, pursuant to the Act of Congress of May 27, 1908, c. 199, § 2, 35 Stat. 312, and the rules and regu-

519.

Opinion of the Court.

lations of the Secretary of the Interior, she made an oil and gas mining lease to McDonnell and Egan covering the lands in controversy, and this was filed in the office of the United States Indian Agent (now designated as Superintendent of the Five Civilized Tribes), Union Agency, at Muskogee, on January 5, 1915. It was forwarded by the Agent to the Commissioner of Indian Affairs with a favorable recommendation October 14, 1915; submitted by the Commissioner to the Secretary of the Interior for approval, and by him approved October 21, 1915. It was first filed for record in the county clerk's office of Tulsa County on August 10, 1916. Appellees are the owners of this lease, and are in possession of the lands.

Jennie Samuels died intestate October 11, 1915 (ten days before the Secretary's approval of the above lease), leaving as her heirs a daughter, Feney Rogers, and a granddaughter, Lina White, both full-blood Creek Indians, and to them the lands descended, subject to the lease. In the following December they made oil and gas leases to one Williams covering the same 80 acres, which were approved by the county court having jurisdiction of the estate of Jennie Samuels, and were recorded in the county records prior to August 10, 1916. These leases are held by appellant, whose interest was acquired, according to the averments of the petition, without knowledge or notice of the lease made by Jennie Samuels.

Appellees, having entered into possession, commenced drilling and discovered and produced petroleum and natural gas in paying quantities. This suit was commenced in January, 1917, appellant praying that their lease be canceled and they enjoined from interfering with appellant in the possession of the premises, and required to account.

Like the courts below, we find it unnecessary to consider the inherent validity or invalidity of appellant's

title, because we conclude that that of appellees is good and has priority over it. The authority of the Secretary of the Interior to approve and thereby confirm oil and gas mining leases made by full-blood Creek allottees upon their allotments—derived from § 2 of the Act of May 27, 1908—did not cease at the death of the allottee by reason of the provision of § 9 of the same act (35 Stat. 315), "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." The validity of the lease made by Jennie Samuels having been conditioned upon the approval of the Secretary, such approval might be given at any time either before or after her death, so far as the rights of her heirs and those claiming under them with notice were concerned, and the approval when given related back and took effect as of the execution of the lease by the parties named therein (*Pickering v. Lomax*, 145 U. S. 310, 314, 316; *Lomax v. Pickering*, 173 U. S. 26, 27, 32; *Lykins v. McGrath*, 184 U. S. 169, 171-172).

The lease received the approval which gave it complete validity, some time before the first of the leases made by the heirs to Williams. And Williams was charged with notice of the prior grant, because, under the provision of the Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1026, "The filing heretofore or hereafter on any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice," the lodging of the prior lease with that officer in January, 1915, for transmission to the Secretary of the Interior, constituted notice to all parties thereafter claiming under her or her heirs. We agree that this provision was neither repealed nor superseded by the admis-

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sion of the State of Oklahoma into the Union, or by the provisions of the Enabling Act, or the constitution of the State which became effective November 16, 1907. As the Circuit Court of Appeals pointed out (257 Fed. Rep. 282), § 1 of the Enabling Act (June 16, 1906, c. 3335, 34 Stat. 267), contained a proviso "that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians . . . or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." While § 21 of the same act (34 Stat. 277), and § 2 of the Schedule to the constitution of Oklahoma (Rev. Laws Oklahoma, 1910, p. excix), contained provisions to the effect that laws in force in the Territory of Oklahoma at the time of the admission of the State not repugnant to its constitution and not locally inapplicable should be extended to and remain in force throughout the State, there was nothing to show an intent to repeal or supersede the provision of the Act of Congress of March 1, 1907, above quoted, or to establish the local recordation statutes in its place so far as related to Indian leases, such as we have here. See *Ex parte Webb*, 225 U. S. 663, 682-683.

The satisfactory reasoning of the courts below, which we have followed in outline, has the support of a well-considered decision by the Supreme Court of Oklahoma in *Scioto Oil Co. v. O'Hern*, 169 Pac. Rep. 483.

Appellant lays some stress upon particular provisions in the Jennie Samuels lease, but we find nothing in them to affect the result. They are sufficiently dealt with in the opinion of the Circuit Court of Appeals (257 Fed. Rep. 280-281).

Decree affirmed.